A

Compendious Collection of the LAWS of ENGLAND,

Touching Matters Criminal.

Faithfully collected and Methodically digested, not only for the use of Sheriffs, Justices of the Peace, Coroners, Clerks of the Peace *and others within that Verge; but of* all the People *in general.*

By *J. B.* Esq.

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Maximæ Dignationis,

Ac quondam Coll. Regin.

IN ACAD. OXONIENSIS

Alumnis Ornatissimis,

Domino Josepho Williamson *Equestris & Senatorii Ordinis Socio Dignissimo, M. Monarchæ semper Aug. simulac Clementissim. nostri D. D.* Caroli Secundi *Primicerio, eidemque Serenissimo Principi ab intimis suis Consiliis.*

Thomæ Lamplugh *S. T. D. Eccleſiæ Roff. Decan. Archidiac.* Londinensi, *ac S. R. M. a Sacris Domesticis,*

Necnon

D. Roberto Southwell, *Militi Aurato, S. R. M. Britanniæ in Sanctiori suo Consilio Secretario, in Concessu Ordinum totius Regni Senatori gravissimo.*

TRACTATULUM HUNC

De Jure ac Judicio Criminis non simulate, sed vere ex animo consecrat, Collegii Præfati olim etiam Alumnis, atque amplitudini

N N. suorum nunc Servus Devotissimus

J. B.

JUS CRIMINIS:
OR THE
Law of ENGLAND,
TOUCHING
Matters Criminal.

JUS CRIMINIS, or the Obligation of Crime, is whereby a Subject for a Delict, or Offence against the Imperial Crown of *England*, is obnoxious, and liable to punishment. And a delict, or offence is, whereby the *King*, and Common-wealth (which make but one) are injured.

Of Offences, commonly termed Pleas of the Crown, some are perpetrated mediatly against the Crown (though not principally, yet consequentially;) And some immediatly are said to be committed against the *King* Himself, who is Head of the Common-wealth, and in whom all general Injuries reside, and to whom the Reformation of all Publique wrongs doth inseperably appertain.

The former kind may be divided into 3 Classes, (*viz.*)

1. Into those that have Relation to life it self, such as *Homicide*.

2, Into those that respect the Body and Members, as Battery, Mayhem, and Rape.

3. Into those that belong to Dominion, or property, such as Theft, and burning of Houses.

The *latter kind* do comprehend High-Treason, Misprision of Treason, Robbing the *King*'s Treasure, Bribery, Extortion, striking in any of the *King*'s *Courts*, where *He* resides Personally, or by Representation, and all manner of Breaches of the Publique Peace; such as Conjurations, Routs, Ryots, Affrayes, Duels, Lybels, and false Rumours. *Of these several kinds in their Order.*

1. *Of those Crimes that are committed mediatly*, contra Coronam & dignitatem Regis, *and do relate to Life it self, as* Homicides.

In *Homicide*, are worthy of Observation, the Etymologie of it, and its general Division.

Lib. 3. c. 4. nu. 3. de corona.

Est homicidium, sayes *Bracton*, *hominis Occisio*, *ab homine facta*, *si enim a Bove*, *Cane*, *vel alia re non dicetur proprie Homicidium*, *Est dictum Homicidium*, *ab homine*, & *Cædo*. *quasi hominis Cædim* : And with *Bracton* doth Concurre in this matter, another antient Author *viz.* Mr. *Horne*, whose very words are these: *Homicide est Occision de Home per Home*

Mirror. c. 1. § ect. 9.

fait, *car si soit per beste*, *ou mischeance nest Homicide*. Thus much of the Definition, and Origination of the word *Homicide* : As for the right division of *Homicide*, take this as followeth : Of *Homicides* some be done.

1. *Proposito*, voluntarily, and of malice forethought, as petty-Treason, and Murther,

2. *Impetu*, voluntarily, and not of malice fore-

fore-thought: Of these some be Felony, as Man-slaughter, and some be no Felony; Of which, some be in respect of giving back inevitably in defence of himself, upon an assault of Revenge; and some without any giving back, as upon the Assault of a Thief, or Robber, upon a man in house, or abroad. Some upon the Assault of one, that is under Custody, as the Sherif, or Gaoler assaulted by his prisoner; some in respect that he is an Officer, or Minister of Justice, without any assault in Execution of his Office or Lawful warrant. Co. 3. Inst. f. 54.

3. *Casu*, such as be no Felony, neither forethought, nor voluntary, as Man-slaughters by misadventure. Having shewed the Reader Sr. *Edward Cook*'s division of *Homicide*; I begin with the first Branch, *viz. Homicide* voluntary, and of malice fore-thought, and this conteines petit Treason, and Murder.

Treason (being derived from *Trahir*) which is treacherously to betray, *Traitre* betrayed, and *Trahison per Contractionem*, Treason is the betraying it self, it is divided into two parts, into High Treason, and petit Treason: It is called High, or Grand Treason in respect of the Royal Majesty against whom it is perpetrated, and Comparatively it is stiled petty Treason, in respect it is committed against Subjects, and inferior persons; so that this petit Treason is when wilful Murder (in the Estate *Oeconomical*,) is committed upon any Subject, by one that is in subjection, & oweth Faith, Duty, and Obedience to the party Murdered; as in these three Cases following, which are only 1 Petit Treason. Co. 3. Inst. f. 4. & 20.

mentioned by the Statute of 25. *E.* 3. C. 2. *de prodicionibus*, and likewise by *Britton Cap.* 8. & 22.

1. When a servant slayeth his Master: This was petit Treason by the *Common Law*, for it appeareth by the Book 12. *Ass.* that a woman servant killed her Mrs, wherefore she had Judgment given to be burned, which is the Judgment at this day of a woman for petit Treason. And herewith agreeth 21 E. 3. 17.

12 Ass. pl. 30.

Upon the Act aforesaid, if the servant kill the wife of his Master, it is petit Treason, for he is servant both to the Husband and wife.

19 H. 6. 47.

A servant upon malice pretended, shooteth at a stranger and missethhim, and killeth his Master, being by; this is petit Treason in the servant (though he intended no hurt to his said Master yet) because he intended Murther thereby.

Plowdens Com. 86. b. Crompt. 20.

A Servant commands one to beat his Master, and he killeth him, this is petit Treason in the servant if he be present.

Crompt. 20.

If a servant has an intent to kill his Master, and before the Execution of his purpose, departeth out of his Masters service, and being out of his service, put his Intent in Execution, aud kills him, who was his Master; this is petit Treason: for the Execution of the Act, hath a Retrospection to the Original Cause, which was malice conceived when he was a servant.

Co. lib. 1. Shellies case 99b. 10. H. 6. 47. Plowdens. Com. 260. Co. 3. Inst. f. 20.

A maid-servant conspires to kill her Mistress, it is petit Treason in her, and Murder in the Actor.

Moores Reports. nu. 227. f. 91.

2. When

2. When a Wife ſlayeth her Husband.

The wife maliciouſly killeth her Husband, this is petit Treaſon in her: But if the Husband maliciouſly killeth his Wife, this is only Murther: the reaſon of this diverſity is, for that the one is in ſubjection, and oweth Obedience, and not the other.

The wife poyſoneth an Apple, to the intent to poyſon a ſtranger therewith, and laid it to that purpoſe in a ſecret place, and the Husband by chance eateth of it, and dyeth thereof, within a Year and a day; this is petit Treaſon in the Wife, for that ſhe intended Murther thereby; ſo if the Wife poyſoneth an Apple, or other thing, and delivereth it to *B.* (knowing of the poyſon) to give to *C.* and *B.* giveth it to the Husband (without the aſſent of the Wife) who eateth thereof in the Wives abſence, and he dyeth thereof, this is petit Treaſon in the Wife: But if the Wife poyſoneth a thing, to the intent to poyſon her Husband therewith, the Husband eateth of it, and becometh very ſick, but recovereth: after a ſtranger eateth thereof, and dyeth thereof, this is onely murther in the Wife. Cromp. 20. Plowd. Com. f. 474.

If the Wife and Servant conſpire the Husbands death, he is killed by the Servant, in the abſence of the Wife, this is petit Treaſon in them both, and the Wife ſhall be burnt. But if it had been a ſtranger, it had been murder in him onely, and petit Treaſon in the Wife. Co: 3: Juſt f: 20.

Baron, and *Feme* out of affection were reſolved to go out of the World together; The Wife buyes poyſon, both take it, the Husband

dyed; It is a quære in the Book, whether this were murther in the Wife.

The Woman's Lawyer, lib. 3. sect. 44.

A Woman compasseth with her Avowterer, the death of her Husband, they assailed him, Riding on the Highway, beating, wounding, leaving him for dead, and then they fled: The Husband got up, levied Hue and cry; came before the Justices, they sent after the Offenders, which were gotten, arraigned, and the matter found by the Verdict, the Adulterer was hanged, the Woman burned to death, the Husband living: This Judgement was given when *voluntas reputabatur pro facto, Sic Metellus Celer Sergium damnavit, & non factum, sed animus in questionem deductus est: Plusque voluisse peccare nocuit, quam non peccasse profuit:* But at this day in case of Felony, *Non debet obesse Conatus, ubi injuria nullum habet effectum.*

3. *When a Secular, or Religious man slayeth his Prelate, Ordinary, or Superiour, to whom he oweth Faith and Obedience.*

Note, that unto the Bishop of every Diocess, the Clerks within their Diocess, do owe Faith and Obedience, which is called Canonical Obedience.

Note likewise, that whatsoever Act will prove murder between strangers, the same will make petit Treason from the Servant to his Master, from the Wife to the Husband, from the Clerk to his Prelate, or Ordinary, *Mutatis Mutandis*: But whether from a Child to the Father, or Mother, *&c.* may be a Quære, for some

ſome hold that it is petit Treaſon, and others that it is not.

If the Child maliciouſly killeth the Father, or Mother, this ſayes one is petit Treaſon (although the Father or Mother at the ſame time gave neither meat, drink, or Apparel, nor wages to ſuch Child) in reſpect of the duty of nature violated, *vide* 21. *E.* 3. 17 *Book* Treaſon 6.

A Baſtard killeth his Mother, this ſeemeth petit Treaſon; for the Mother is certainly known. Crompt' 21.

The Son, or Daughter in Law, killeth the Father, or Mother in Law, with whom they dwell, and do ſervice, and have meat, and drink, it is petit Treaſon; although ſuch Child take no wages, but the Indictment ſhall be by the name of Servant. Daliſons *Rep.* 1. Mar. 1.

But my L. *Coke* ſays thus; If the Child commit *Parricide* in killing his Father and Mother (of which *Solon interrogatus cur nullus parricidio ſupplicium indixiſſet? Se id neminem facturum putaſſe reſpondit.* The Law-makers never imagined any child would do) this caſe is out of the Stat. of 25. *E.* 3, *c.* 2. unleſs the child ſerved the Father, or Mother for wages, or meat, drink, or apparel, for that it is none of thoſe three kinds ſpecified in the Law aforeſaid: And yet (ſayes he) the offence is far more hainous, and impious in a child, than in a ſervant, for, *peccata contra naturam ſunt graviſſima*; but the Judges are reſtrained by the ſaid Act, to interpret it, *a ſimili*, or *a Minore ad Majus.* The hainouſneſs of this *Parricide* ap-

pears by that punishment, which is ordained in the civil Law, for those that are guilty of the Crime: *Pœna parricidij more Majorum hæc instituta est, ut parricida virgis sanguineis verberatus, deinde culleo insuatur cum Cane, gallo gallinaceo, & vipera, & simia, deinde in mare profundum Culleus jactetur*, D. 48. 9, 9. Thus much of petit Treason.

2, Murder, Co. Litt. 287, b, Stamfords. Plees of Crown, lib. 1,

Murder cometh of the Saxon word *Mordrue*, or *Mordren*, and *Mordridus* is the Murderer even untill this day amongst them in *Saxony*, from whence we have most of our words; or, it may be derived of *Mort*, and *Dire*, as *Mors Dira*, a Cruel or Horrible death.

This Murther in our Law is Two-fold, either of himself, or of another.

1. *Of Murdering a mans self, called* Felo de se.

Felo de se (sayes *Coke*) is a man, or woman, which being *Compos mentis*, of sound memory, and of the Age of Discretion, killeth himself, which being lawfully found by the Oath of Twelve men; all the Goods and Chattels of the party so offending are forfeited: And the Reason why *Felo de se* doth forfeit all his Goods and Chattels is, because it is an offence against the King, who by that perpetration is deprived of a Subject: And indeed no man by the Law of nature hath such power over his own life, as to take it away, or to oblige it by any Contract, or Bargain, *vide Grot. Lib.* 2. *c.* 21. *nu.* 11. *Lib.* 3. *c.* 11, *nu.* 18. Having shew-

ed

ed the Deſcription of *Felo de ſe*, and the Reaſon of forfeiting his Chattels, I propoſe theſe Queries with their Reſolutions.

Whether a perſon that is non compos mentis, *giving himſelf a mortal wound, and after recovering his memory, before death enſues, be* Felo de ſe? Quære 1,

If one during the time that he is *non compos mentis* giveth himſelf a mortal wound, whereof he, when he hath recovered his memory dyeth, he is not *Felo de ſe*; And the Reaſon is *be*cauſe the ſtroke, which was the cauſe of his death, was given, when he was not *Compos mentis. Et actus non facit Reum, niſi meus ſit rea:* And this is agreeable to the civil Law: *Maleficia voluntas, & propoſitum diſtinguit: voluntas & propoſitum maleficium delinquentis diſtinguit: Delictam ceſſat, ubi delinquendi animus non eſt.* Reſp, D, 47, 253,

Whether a man can be ſaid to be Felo de ſe *upon an involuntary Act?* Qu, 2,

A man may be ſo; As if *A.* give *B.* ſuch a ſtroke, as he felleth him to the ground, *B.* draweth his knife, and holds it up for his own defence: *A.* in haſt, meaning to fall upon *B.* to kill him, falleth upon the knife of *B.* whereby he is wounded to death, he is *Felo de ſe*: For *B.* did nothing but that which was lawful in his own defence; *Et vim vi defendere* ſayes the civil Law, *omnes leges, omniaque jura permittunt*, D. 9. 2, 45, 4. Reſp, 44 E, 3, 44, 3 E, 3, Cor 286, Co, 3, Inſt, f. 54,

Whether the goods of Felo de ſe *be forfeited before it be found of Record, that he is* Felo de ſe? Qu, 3,

No Goods be forfeited, untill it be lawfully found by the Oath of Twelve men, that he is Reſp,

Felo

Plowd. fol, 360, b. *Felo de ſe*: And this doth belong to the *Coroner*, *ſuper viſum Corporis*, to enquire thereof: and if it be found before the *Coroner*, *ſuper viſum Corporis*, that he was *Felo de ſe*, the Executors or Adminiſtrators of the dead ſhall have no Traverſe thereunto. And this is the reaſon that no man can preſcribe to have Felons goods, becauſe they are not forfeited untill it be found of Record, that he is *Felo de ſe*.

Co, Lit, f, 114, ab, l, 5, f, 109.

Qu, 4. *How a* Felo de ſe *ſhall be enquired of, where the body cannot be found?*

Reſp. If a man be *Felo de ſe*, and is caſt into the Sea, or otherwiſe ſo ſecretly hidden, as the *Coroner* cannot have the view of the body, and by conſequence cannot enquire thereof: In this caſe it may be inquired thereof by the Juſtices of Peace of that County, for they have power by their Commiſſion to inquire of all Felonies. But if it be found before them, the Executors, or Adminiſtrators of the dead may have a Traverſe thereunto, but not to the Indictment taken before the Coroner, *ſuper viſum corporis*, as before is ſaid.

Hill, 37 Eliz; *in the* King's-Bench *by the whole Court, in the Caſe of one* Laughton *of* Cheſhire.

Qu, 5, *Whether a joynt Tenant of Chattels perſonals, becoming* Felo de ſe, *doth forfeit the whole?*

Reſp, There is a diverſity between Chattels perſonals in Action, and in poſſeſſion: for if a debt be owing to two, unleſs it be in caſe of Joynt-Merchants, and the one is *Felo de ſe*, he doth forfeit the whole: but otherwiſe it is of goods in poſſeſſion, for there he forfeiteth but his part.

8 E, 4, 4, 7 E, 4, 7, a, Plowd, Com, 259, b,

Qu, 6, *Whether a debt upon a bare Contract be forfeitable?*

If

If a man that is *Felo de se* has a debt upon a bare contract, and not upon ſpecialty, this ſhall not be forfeited unto the King. Thus much of *Felo de ſe*. Reſp, Dyer 262, a,

2 *Of Murder in reſpect of another.*

Bracton defineth this kind of Murder to be *Homicidium, quod nullo præſente, nullo ſciente nullo audiente, nullo videnti, clam perpetratur*: And of the ſame mind is *Britton*, whoſe words are *Murdre eſt occiſion de home diſconu felonioufment fait dount home ne poit ſcaver per qui, ne per quex*: As alſo *Fleta*: *Eſt murdrum occulta hominum occiſio, a manibus hominum nequiter perpetrata, que nullo ſciente vel videnti, facta eſt, preter ſolum Interfectorem, & ſuos coadjutores & fautores*: yet *Fleta* ſaith alſo, that it was not murder, except it were proved, that the party ſlain were Engliſh, and no ſtranger: But as *Stamford* ſaith, the Law in this point hath received an alteration by the Stat. of 14. E. 3. And therefore this murder is now otherwiſe to be defined, or deſcribed: It is when a Reaſonable Creature (be it man, woman, child, Subject born, or Alien, perſons outlawed, or otherwiſe attainted of Treaſon, Felony, or premunire, Chriſtian, Jew, Heathen, Turk, or other Infidel, being under the Kings peace) is ſlain, or killed by a man of ſound memory, and of the age of diſcretion, with malice forethought either expreſſed by the party, or implied by Law. Lib, 3, c, 15, nu, 1, de Coron: Britton, c, 6, Lib, 1, c, 30, 14 E, 3, c, 4

Touch-

Touching the former, *viz.* Malice expreſſed, take theſe Queries with their *Solutions*:

Qu. 1, *Whether this ſame malice, though it be intended againſt one, it ſhall be extended towards another?*

Sol, This Malice is ſo odious in Law, as though it be intended againſt one, it ſhall be extended towards another; And therefore *Bracton*'s words are; *ſiquis unum percuſſerit cum alium percutere vellet, in felonia tenetur:* As if *A.* put poyſon into a pot, to the intent to poyſon *B.* and ſet the ſame in a place, where he ſuppoſeth *B.* will come and drink thereof, and by accident one *C.* unto whom *A.* hath no malice, cometh, and of his own will taketh the pot, and drinketh thereof, of which poyſon he dyeth; This is murder in *A.* for the Law doth couple the event with the intention, and the end with the cauſe: But herein is a diverſity between the principal, and the Acceſſory; For if *A.* command *B.* to kill *I. S.* and *B.* killeth *I. D.* miſtaking him for *I. S.* this is murder in *B.* becauſe he did the Act, which ſprang out of the Root of malice, but *A.* is not Acceſſory, becauſe his own commandment was not purſued: But on the other ſide, if *A.* command *B.* to kill *I. S.* by poyſon, and he doth it by violence, as by weapon, ſharpe or blunt, Gun, Croſs-bow, Cruſhing, *&c.* in this caſe notwithſtanding the fact be not executed according to the mean preſcribed; yet *A.* is Acceſſory nevertheleſs; for the commandment was to kill, which enſued, though the mean was not followed.

Co, Lib, 9, Gorts Caſe 81,

Plowd, Com, Saunders Caſe,

Whe-

Whether killing a man by poyſon be more deteſtable, than by any other means? Qu. 2.

To kill a man by poyſon, ſayes *Coke*, is the moſt deteſtable of all, becauſe it is moſt horrible and fearful to the nature of man, and of all others can be leaſt prevented, either by Manhood, or providence: This offence was ſo odious, that by Act of Parliament it was made High Treaſon, and it inflicted a more grievous and lingring death, than the common Law preſcribed, *viz.* That the Offendor ſhall be boyled to death in hot water: upon which Statute *Margaret Davy* a young woman was attainted of High Treaſon for poyſoning her Miſtreſs, and ſome others, was boyled to death in *Smithfield* the Seventeenth of *March* in the ſame year: But this Act was afterwards repealed by 1. *E.* 6. *c.* 12. and 1. *Mar. c.* 1. Having given you the words of Sir *Edward Coke*, touching poyſoning, I ſhall mention ſomething in the civil Law concerning it: Sol, 22H,8,c,9, Anno 33 H, 8,

Plus eſt hominem extinguere veneno, quam occidere gladio. For *Clam interficere*, ſayes *Gothofredus* on the Text, *gravius eſt, quam palam.* Cod,9,1,8

Plus eſt hominem veneno extinguere, quam gladio occidere. Doctores ad Juſt, 4, 18 5,

Lege Cornelia, & veneficij Capite damnantur qui artibus odioſis, tam venenis, quam ſuſurris magicis homines occiderint; vel mala medicamenta publice vendiderint. Juſt,4, 28, 5, D,48, 81,& 3,

Whether an Infant within the age of Nine years, can be guilty of Murder? Qu, 3.

Un Infant deins age ix ans occiſt un Enfant de ix ans & Confeſſe le Felony, & auxi fuit trove que Sul,

que quant il luy avoit tue, il luy occult & auxi le Sanke que fuit ſur luy effundes, ſi il ceo excuſe; And the Judges held, that he ought to be hanged. But *Fairefax* ſaid, that the words of
3H, 7, 1, b. *Ferteſcue* were, *viz.* That the Reaſon why a perſon is executed for Murder, is for example, that others may fear to offend; But ſuch puniſhment can be no example to ſuch an Infant, or to a perſon that hath not diſcretion.

Le Recorder de Londres monſtre coment un enfant extra le age de x. ans, & xii. ans fuit endite de mort, & il fuit appoſe de ceo, & il dit, que il gard barbettes ove ceſtuy que eſt mort & ils happen a variance per que il luy feriſt en le gule, puis en le Teſte & iſſint en divers Lieux del corps tanque qu'il fuit mort, & donques il trahiſt le corps en
3H, 7, 12, b *le corne, & les Juſtices pur ſon rendr', & pur ceo que il narroit le matter playnem ent reſpite le Judgment, & pluſours Juſtic' diſont, que il fuit deigne mort* &c. And the Reaſon is, *quia malitia ſupplet etatem*: with this our Rule do concur the Roman Laws.

Impunitus delicti propter etatem non datur, ſi modo in ea quis ſit, in quam crimen, quod intendi-
Cod. 9, 47, 7, de Pœnis, *tur, cadere poteſt; i. e. ſi modo ſit proximus pubertati, & ea ſentiat in quibus deliquit.*

Gothofredus, *Malitia minoris etatem juſtam eſſe repreſentat, ac ſupplet, vel ſic: Malitiæ non ſuccurritur.*

Qu. 4. *Whether Malice prepenſed muſt be continuing, till the mortal wound given?*

Sol. Albeit there had been malice between two, and after they are pacified, and made friends,
Co. 3, Inſt. f. 51, and after this upon a new occaſion fall out, and the one killeth the other, this is *Homicide*, but

no

no murder, becauſe the former malice continued not.

So if *A.* command *B.* to kill *C.* and before the Act be done, *A.* repenteth, and countermandeth his Commaudment, and charge *B.* not to do it; if *B.* after killeth him, *A.* is not acceſſory to it; for the malicious mind of the Acceſſory ought to continue to do ill, untill the Act done. Ibid,

Whether Murder can be committed of a child in utero matris? Qu, 5,

If a Woman be quick with Child, and by a Potion, or otherwiſe killeth it in her womb; or if a man beat her, whereby the Child dyeth in her Body, and ſhe is delivered of a dead Child, this is a great miſpriſion, and no murder: But if the Child be born alive, and dyeth of the Potion, Battery, or other cauſe, this is murder; for in Law it is accounted a reaſonable Creature, *in rerum natura*, when it is born alive. Sol, 22E.3Cor. 263. 8E.2,Cor. 418,

The Law holden in *Bracton*'s time was, *ſi aliquis, qui mulierem pregnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivus ſi puerperium jam formatum fuerit; & maxime ſi fuerit animatum, facit homicidium.* And let us now ſee what the civil Law ſaith, *de partu abacto; ſi mulierem viſceribus ſuis vim intuliſſe, quo partum abigeret, conſtiterit, eam in exilium preſes Provinciæ exiget.* D, 48,8,8,

Cicero in oratione pro Cluentio Avito ſcripſit, Mileſiam quandam mulierem, cum eſſet in Aſia, quod ab heredibus ſecundis accepta pecunia partum ſibi medicamentis ipſa abegiſſet, rei Capitalis eſſe damnatam. D, 48, 19, 39, *de partu abacto.*

Whe-

Qu, 6, *Whether it be murder in a Mother to conceal the death of her Baſtard Child ?*

Sol, It is Enacted, That if any Woman be delivered of any Iſſue, Male, or Female, which be-

21 Jac, c, 27, ing born alive, ſhould by the Lawes be a Baſtard, and ſhe endeavour privately, either by drowning, or ſecret burying thereof, as that it may not come to light, whether it were born alive, or not, but be concealed ; In every ſuch caſe the ſaid Mother ſo offending, ſhall ſuffer death as in caſe of murder, except ſuch Mother can make proof by one witneſs at leaſt, that the Child, whoſe death was by her ſo intended to be concealed, was born dead.

Qu, 7, *Whether he that ſtabbeth another to death ſhall ſuffer, as in caſe of wilful murder ?*

Sol, It is Enacted, That every perſon, which ſhall ſtab, or thruſt any perſon, that hath not

1 Jac, c, 8, then any Weapon drawn, or hath not then firſt ſtricken the party, which ſhall be ſo ſtabbed, or thruſt ; ſo as the perſon ſtabbed, or thruſt, ſhall thereof dye, within the ſpace of ſix months, although it cannot be proved, that the ſame was done of malice forethought ; yet the party ſo offending, and being thereof convicted by the Verdict of Twelve men, Confeſſion or otherwiſe, according to the Laws of this Realm, ſhall be excluded from the benefit of his Clergie, and ſuffer death, as in caſe of wilful murder.

Qu, 8, *Whether a Murder committed out of the Realm, can be tryed by the Common Law ?*

Sol, If two of the Kings Subjects go over into a

13 H, 4, 5, & 6, Forreign Countrey, and fight there, and the one

one kill the other, this Murder being done out of the Realm, cannot be for want of Tryal heard, and determined by the common Law of *England*; but it may be heard and determined before the *Constable* and *Marshal*, whose Sentence is upon the testimony of witnesses, and combat; and accordingly where a Subject of the *King* was slain in *Scotland* by others of the Kings Subjects, the Wife of the party slain had her appeal therefore before the Constable and Marshal; and so it was resolved in the 35*th*, year of Queen *Elizabeth*, in the case of Sir *Francis Drake*, who strook off the head of *Dowtie*, in *partibus transmarinis*, that his Brother and Heir might have an appeal. Stamf. *pl. cor. f.* 65. Co. Lit. 70. *a*, *b*

So if a man be mortally wounded in *France*, and dyeth thereof in *England*, it is said that an Appeal doth lye upon the statutes of 12 *R.* 2. *c.* 2. and 1 *H.* 4. *c.* 14. for it is not punishable by the common Law, because the stroak was given there where no *Visne* can come, and therefore the same shall be heard and determined before the Constable and Marshal: Thus much of Murder proceeding from Malice prepensed and expressed; as for Malice implyed, it hapneth in three cases. Co. Lit. 70. *b*. Co. 3 Inst. 48,

1 In respect of the manner of the deed; as if one killeth another without any provocation of the part of him that is slain, the Law implyeth malice: if one make a wry, or distorted mouth, or the like countenance upon another, and the other immediatly pursues, and kills him, it is murder, for it shall be presumed to be malice precedent; and that such Co: *lib.* 9. Mac. *Rellyes.*

Cro. 1. part Wats v. Braine f. 779.

a slight provocation is not a sufficient ground or pretence for a Quarrel.

Cro. 3 part Hallow. case 131.

One *Halloway* was Indicted and Arraigned at *Newgate* for Murthering one *Payne*, the Indictment was, that he *Ex malitia præcogitata* tyed the said *Payne* at the Horses tayle, and strook him two stroaks with a cudgel, being tyed to the said Horse, whereupon the Horse ran away with him, and drew him upon the ground three Furlongs, and thereby brake his shoulder, whereof he instantly dyed, and murdered him: Upon this Indictment he being arraigned, pleaded nor guilty, and thereupon a special Verdict found, that the Earl of *Denbigh* was possessed of a Park called *Asgterly Park*, and that the said *Halloway* was Wood-ward of his Woods in the said Park, and that the said *Payne* with others unknown, entred the said Park to cut Wood there, and that the said *Payne* climbed up a Tree, and with an hatcket cut down some boughs thereof, and that the said *Halloway* came riding into the Park, and seeing the said *Payne* on the Tree, commanded him to descend, and he descending from thence, the said *Halloway* stroke him two blows upon the back with his cudgel, and the said *Payne* having a Rope tyed about his middle, and one end of the Rope hanging down, the said *Halloway* tyed the end of that Rope to the Horses tayle, and struck the said *Payne* two blows upon his back, whereupon the said *Payne* being tyed to the Horses tayle, and the Horse running away with him, drew him upon the ground three Furlongs, and by this

this meanes brake his shoulder, whereof he instantly dyed, and the said *Halloway* cast him over the pale into certain bushes, and whether upon all this matter found, the said *Halloway* be guilty of the Murder *prout*, they pray the discretion of the Court, and if the court shall adjudg him guilty of Murder, they find him guilty of Murder; if otherwise, they find him guilty of Man-slaughter; and this special Verdict by *Certiorari* was removed into the Kings Bench, and depended three Termes; and the opinion of all the Judges and Barons was demanded, and they all (besides *Hutton*, who doubted thereof) held clearly that it was Murder: for when the Boy who was cutting on the Tree came down from thence upon his command, and made no resistance, and he then struck him two blowes, and tyed him to the Horses tayle, and struck him again, whereupon the Horse ran away, and he by that meanes slain, the Law implies malice, and it shall be said in Law to be malice prepensed, he doing it to one who made no resistance; he was adjudged to be hanged, and was hanged accordingly.

If a man give poyson to another person, of which poyson the party dyeth within the Year, this implyeth malice, and is adjudged wilful Murder of Malice prepensed. Co. 3. Inst. 52.

Note, that a man may be poysoned Four manner of wayes.

1 *Gustu*, by Taste, that is by Eating or Drinking, being infused into his meat or drink.

2. *Anhelitu.* by taking in breath, as by a poysonous perfume in a Chamber, or other Room.

3 *Contactu*, by touching.

4. and lastly, *Suppositu*, as by a Glister, or the like. Thus much of malice implyed in respect of the manner of the Deed.

2 Malice implyed doth happen in respect of the person slain.

And therefore it hath been resolved, that if any Sheriff, Under-Sheriff, Sergeant, or Officer who hath execution of Process be slain in doing his Duty, it is murder in him who kills him, although there were not any former malice betwixt them; for the Executing of Process is the life of the Law; and therefore he who kills such an Officer shall loose his life; for that Offence is *Contra potestatem Regis & Legis*, and therefore in such case there needs not any inquiry of malice.

Co: *lib*: 9. Mackalleys *case*, Cro: 2 *part*, Mackalleys *case*, Co. *lib*:4. Youngs *case*.

The same Law is, if any Justice of Peace, Constable, or any other Officer, or any who comes with them in their Assistance, for the preservation of the peace be slain in executing their Office, it is murder through malice implyed: so if a Watch-man be killed in staying Night-walkers, it is murder:

One *Thomas Pew*, was Arraigned for the murder of one *Gardiner*, and upon evidence it appears that the said *Gardiner* was a Bayliff Sworn and known, and Under-Bayliff to the Dean of *Westminster*; and he having the Sheriffs Warrant to Arrest the said *Thomas Pew*,

Co. Inst. *f*. 52.

Pew, upon a *Capias* out of the common Bench, and seeing him in Shyre-lane within the liberty of *Westminster*, the said *Pew* seeing him, drew his Sword, and the said *Gardiner* approaching to lay hold upon him; (not using any words of Arrest (as was proved,) *Thomas Pew* said (as it was proved upon the Examination of two Witnesses before the Coroner) stand off, come not near me, I know you well enough, come at your peril; and the Bayliff taking hold of him, he thrust him with his Sword that he dyed immediatly: It was held by all the Court that it was murder, for he coming as an Officer to Arrest, and not offering any violence, or provocation, although he used not words, I Arrest you, or shewed him any Warrant, because peradventure he had not time, nor was demanded the cause, the Law presumes it to be malice and murder in him that so kills one being an Officer, and coming to execute process.

Resolved that if there be Error in Awarding of process, or in the mistake of one process for another, and an Officer be slain in the Execution thereof, the offendor shall not have the Advantage of such Error no more then a Sheriff who suffers a prisoner to escape, shall take advantage of any Error thereby, but the Resisting of an Officer when he comes to make an Arrest in the Kings name, is murder: But a man shall take advantage against an Officer where he is slain in doing an unlawful act; so likewise upon a variance in an essential part of the parties Name.

Cro: 2 part Mackalleyes case,

As to the former, take this Resolution:

One *Cook* was Indicted for the Murder of *Marshal*, upon his Arraignment pleading not guilty, it was found that the said *Marshal* was a Bayliff to the Sheriff of ——— and had several Warrants upon several *Capias ad satisfac.* against the said *Cook*, and his Father directed unto him, and other Bayliffs, and that they by vertue or colour thereof, entred into the said *Cookes* stable and out-house, and hid themselves all Night, and at 8 of the clock next morning coming to *Cooks* dwelling House, called to open his doors, and suffer them to enter, because they had such Warrants upon such Writs at the Suit of such persons to Arrest him, and willed him to obey them: But the said *Cook* commanded them to depart, telling them they should not enter; and thereupon they brake the Window, and afterward came unto the door of the said House, and offered to force that open, and brake one of the Hinges thereof, whereupon the said *Cook* discharged his Musquet at the said *Marshal*, and strook him, of which stroke the day following he Dyed; and whether upon all this matter he be guilty of Murder or Man-slaughter, was the doubt. After Argument for *Cook* at the Bar, all the Justices delivered their opinions, that it was not Murder, but Man-slaughter only; for although he killed a Bayliff, yet he killed him not in duly executing process; for it is not Murder, unless there be *Malitia præcogitata*, or *Malitia implicita*, as to Murder one suddenly, or in Resistance

Crook 3 part, Cooks case 573.

ſiſtance of an Officer doing his Office by ſerving the proceſs of Law wherein he is aſſiſted *Cum poteſtate Regis & Legis.* But here this Bayliff was ſlain in doing an unlawful Act, in ſeeking to break open the Houſe, to execute proceſs for a Subject, which he ought not to do by Law; although he might have Entred if the door had been open and arreſted the party, and it had been lawful, yet he ought not to break open the Houſe, for that it is not Warranted by Law, and eſpecially lying there in the night, and in the morning breaking the Window, and offering to force the door, which is not ſufferable, for under colour thereof one may enter who hath not any ſuch Authority, and every one is to defend his own Houſe; yet they all held that it was Man-ſlaughter, for he might have reſiſted him without killing him, and when he ſaw him, and ſhot voluntarily at him, it was Man-ſlaughter.

As to the later touching the parties name, take this Reſolution:

Sir *Henry Ferrers* was Indicted by the name of Sir *Henry Ferrers* Knight, for the Murder of one *Stone* whom one *Nightingale* Feloniouſly murdered, and that the ſaid Sir *Henry* was preſent, aiding and abetting *&c.* Upon this Indictment Sir *Henry Ferrers* being Arraigned, ſaid that he was never Knighted, which being confeſſed, the Indictment was held not to be ſufficient; wherefore he was Indicted *de novo*, by the name of Sir *Henry Ferrers* Baronet, and being Arraigned, pleaded

Co. 3 *part* Ferrers *caſe f.* 371, 372.

Not Guilty, and was tryed at the Bar, and upon Evideuce it appeared that he was Arreſted for Debt, and that *Nightingale* his Servant in ſeeking to Reſcue him as was pretended, killed the ſaid *Stone*; but becauſe the Warrant to Arreſt him was by the name of Sir *Henry Ferrers* Knight, aud he never was a Knight; it was held by all the Court, that it was a variance in an Eſſential part of the Name, and they had no Authority by that Warrant to Arreſt Sir *Henry Ferrers* Baronet: So it is an ill Warrant, and the killing of an Officer in executing that Warrant cannot be murder, becauſe no good Warrant.

3. There is malice implyed in reſpect of the perſon killing.

As if *A.* aſſault *B.* to Rob him, and in reſiſting *A.* killeth *B.* this is Murder by malice implyed, albeit he never ſaw, or knew him before.

So if a priſoner by the Dureſs of the Goaler cometh unto an untimely death, this is murder in the Goaler, and the Law implyeth malice in reſpect of the eruelty; and this is the cauſe, that if any man dyeth in priſon, the Coroner ought to ſet upon his Body, to the end it may be inquired of, whether he came to his death by Dureſs of the Goaler, or otherwiſe.

Co. 3. Inſt. f. 52, & 91.

So if the Sheriff or other Officer where he ought to hang the party attainted according to his Judgment, and his Charge, will againſt the Law, of his own wrong, burn or behead him, or *e converſo*; the Law in this caſe implyeth malice in him.

Doct. & Stud. *lib.* 2. *c.* 41. Co. 3. Inſt. f. 52. & 217.

So

So if a *Capias* be directed unto the *Sheriff*, to take a man in an Action of Debt, or Trespass, there no man can take the Party but he must have Authority from the *Sheriff*; and if any man attempt of his own Authority to take him, and he Resisteth, and in Resisting is slain, he that would have taken him is guilty of Murder. Doct. & Stud: *lib.* 2. *c.* 42.

So if the *Sheriff* will by the Authority which the Law giveth him, Arrest any man for Felony, which is not guilty, the party may Rescue himself, and if upon the Rescous the party is slain by the *Sheriff*, he is guilty of his death. But if *A.* be Indicted of Murder, Robbery, Burglary, or other Felony, and the *Sheriff* by vertue of a *Capias* offer to Arrest him, and he Resisteth and flyeth, the *Sheriff* may kill him, if otherwise he cannot Arrest him, although in truth the party be *Not Guilty*, nor any Felony done: So by this we see that there is a diversity between a *Warrant* of *Record*, and a *Warrant* and Authority in Law. Co. Lit. 161, *a.* Co. 3. Inst. 221. 4 H. 7. 20. 14 H. 8. 18

Thus much of *Homicides* Voluntary, and of Malice fore-thought, *viz.* Petit Treason, and Murder.

It was the Law of *Numa Pompilius*: *Si quis Hominem Liberum dolo sciens morti duit, parricida est.*

As there are *Homicides* that are voluntary, and of malice fore thought, so there are some that be voluntary, and not of malice fore-thought; of which some be Felony, as Man-slaugh-

ſlaughter, and ſome be not Felony, as *Se Defendendo, &c.*

1. *Of* Homicide, *which for Diſtinction-ſake we call* Manſlaughter.

Co. Lit. 287. *b.*

Man-ſlaughter is when one is ſlain with a mans will, but not with malice prepenſed upon ſome ſudden falling out, or Quarrel; as if two meet together, and ſtriving for the Wall the one kill the other; this is Manſlaughter and Felony. So if two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their Weapon, and go into the field, and therein fight, the one killeth the other; here is no malice prepenſed, for the fetching of the Weapon, and going into the field, is but a continuance of the ſudden falling out, and the Heat of the Blood kindled by Ire, was never cooled till the blow was given. But if they appoint to fight the next day, that is malice prepenſed, and conſequently not Man-ſlaughter, but Murder.

Co. Inſt, 51. & 55.

One *Royley* was Indicted of the Murder of *William Derman*, and upon his Tryal a ſpecial Verdict was found, which was removed into the Kings Bench by *Certiorari*; whereupon the caſe was found to be ſuch, that *William Royley* Son of the ſaid *Royley* fighting with the ſaid *Derman*, and the ſaid *Derman* beating him ſo as his Noſe bled, he thereupon went to his Father, telling and complaining unto him of that Battery; whereupon the Father inſtantly

Cro. 2. *part* 1. Royleys *caſe*, 296.

ſtantly went into the field, and finding *Derman*, called him Villein, and other opprobrious terms, and ſtruck him with a little cudgel, of which ſtroke he afterwards dyed; and whether that were murder, or only man-ſlaughter, they doubted, and prayed the diſcretion of the Court, and all the Court Reſolved, that it was but man-ſlaughter, for he going upon the complaint of his Son, not having any malice before, and in that anger beating him, of which ſtroke he dyed, the Law ſhall adjudg it to be upon that ſudden occaſion, and ſtirring of Blood, being alſo provoked at the ſight of his Sons blood that he made that Aſſault, and will not preſume it to be upon malice, unleſs it be found. And although the diſtance of the place where his Son complained was a mile, it is not material, being all upon one paſſion. So if one hear that his Brother, Couſin, or Servant is fighting upon a ſudden occaſion, and he go to the place where they are fighting, (although a mile or more diſtant,) and finding the Adverſary, fights with him, and kills him, it is not Murder, but Man-ſlaughter, and being before the general Pardon, was diſcharged thereby.

Thus much of Man-ſlaughter, that is not of malice prepenſed, but yet Felony.

3. Of Se Defedendo, *that is Voluntary, and not Felony.*

Se Defedendo is voluntary Homicide, and yet being done upon an inevitable occasion, is no Felony; as if *A.* be Assaulted by *B.* and they fight together, and before any mortal blow given *A.* giveth back until he cometh to a hedg, wall, or other straight beyond which he cannot pass, and then in his own Defence killeth the other, this is voluntary, and yet no Felony; and the Jury that find it was done *Se defedendo*, ought to find the special matter.

But yet there are some Cases wherein a man is bound to give back; as

Fleta *lib.* 1. *c.* 23. Co. 3. Inst. 56.

1. If *A.* Assault *B.* so fiercely and violently, and in such a place, and in such a manner as if *B.* should give back, he should be in danger of his life, he may in this Case defend himself, and if in that Defence he killeth *A.* it is *Se Defedendo*, because it is not done *Felleo animo*, and consequently Justifiable; with our Law dos Concur the Law Imperial: *Jure hoc evenit, ut quod quisque ob tutelam Corporis sui fecerit, jure fecisse existimetur. Non injuria fecit, qui se tueri voluit, cum alias non posset.*

D:1.7, 3.

D. 47.9,3. 7.

Co. *lib.* 5. Seinaynts *case* 21. 1 H. 7. 39 Co. 3. Inst. 56.

2. If a Thief offer to Rob or Murder *B.* either abroad, or in his House, and thereupon Assault him, and *B.* defend himself without any giving back, and in his Defence killeth the Thief, this is no Felony, for a man shall never

never give way to a Thief, &c. neither ſhall he Forfeit any thing, and ſo it is declared by the ſtatute of 24 *H.* 8. *c.* 5.

One *Cooper* being Indicted in the County of *Surrey* of the murder of one *W. L.* in *Southwark*, he pleaded *Not Guilty*, and upon his Arraignment it appeared that the ſaid *Cooper* being a priſoner in the Kings Bench, and lying in the Houſe of one *Anne Carrick*, who kept a Tavern within the Rules, the ſaid *W. L.* at one of the clock in the Night aſſaulted the ſaid Houſe, and offered to break the ſtaple thereof, and ſwore he would enter the Houſe, and ſlit the Noſe of the ſaid *Anne Carrick*, becauſe ſhe was a Bawd, and kept a Bawdy-Houſe; and the ſaid *Cooper* diſſwading him from theſe Courſes, and reprehending him, he ſwore that if he could enter, he would cut the ſaid *Coopers* Throat; and he brake a window in the lower Room of the Houſe, and thruſt his Rapier in at the window againſt the ſaid *Cooper*, who in defence of the Houſe, and himſelf, thruſt the ſaid *W. L.* into the eye, of which ſtroak he dyed. The Queſtion was, whether this were within the Statute of 24 *H.* 8. and the opinion of the Court was, that if it were true that he brake the Houſe with an intent to commit Burglary, or to kill any therein, and a party within the Houſe, (although he be not the Maſter, but a Lodger or Sojourner therein) kill him who made the Aſſault, and intended miſchief to any in it, that it is not Felony, but excuſable by the Statute of 24 *H.* 8. Cro. 3. *part* Cowpers *caſe*, 554,

H. 8. which was made in the affirmance of the Common Law; wherefore the Jury were appointed to consider of the circumstances of the Fact, and they being a substantial Jury of *Surrey*, found the said *Cooper* not Guilty upon the Indictment, whereupon he was discharged.

22 Ass. pl. 55. 3. If a prisoner assault the Goaler, the Goaler is not by Law inforced to give back, but if in defence of himself he kill the prisoner, this is no Felony.

3 E. 3. Cor. 290. 4. If any Officer or Minister of Justice that hath lawful Warrant, and the party assault the Officer, or Minister of Justice, he is not bound by Law to give back, but to carry him away; and if in execution of his Office he cannot otherwise avoid it, but in striving kill him, it is no Felony.

Note, if men tilt or turney in the presence of the King; or if two Masters of Defence playing their prizes kill one another, this is no Felony, 11 *H.* 7. 23. *a. Hobarts Reports, Weaver v. Ward f.* 134. And the reason given is, for that in Friendly manner they contend to try their strength, and to be able to do the King service in that kind as occasion should be offered.

Hitherto of *Homicides* that be voluntary, and no Felony, whereof some be in respect of giving back inevitably in defence of himself, upon an assault of Revenge, and some without any giving back, *&c.* I now proceed to that Homicide that is not Felony, neither fore-thought, nor voluntary, and this we call

call Man-slaughter by misadventure, or Chance-medley.

3. *Of Homicide by misadventure.*

Chance medley, or *per Infortunium*, is when one is slain casually, and by misadventure, without the will of him that doth the Act, whereupon death ensueth. Or Homicide by misadventure is when a man without any evil intent doth a lawful thing, or that is not prohibited by Law, and another is slain or cometh to his death thereby, as if one shoot at Butts, or at pricks, and kill a man, by swarving his hands, this is no felony; The same Law is of tiling an House, and a tile fall, and killeth one. So if one trained Souldier hurteth another in skirmish, of which hurt he dies, this being by misadventure is no felony. But in any of these Cases before put if a man be hurt or maimed only, an Action of Trespass lieth against him that was the cause of the hurt, or maime, though it be done against the parties mind and will; because in Civil Trespasses and injuries, that are of an inferior nature, the Law doth rather consider the damage of the party wronged, then the mind of him, that was the wrong doer.

Co. Litt. 287. 6.

11. H. 7. 23. a. 21. H. 7: 28. a. 6. E. 4. 7.

Bract. l. 3. c. 4. n. 3.

Vide Hobarts Reports Weaver against Ward f. 134. But to return from whence I have made a digression: It is to be considered, whether he that committeth this Homicide by misadventure in doing a lawful

Act,

Act, and likewiſe without an evil intent; for if the Act be unlawful, or done with an evil purpoſe, it will prove murther.

1. Touching an unlawful Act: If a man ſhoot at a Cock or Hen, or any fowl of another man, and the arrow by miſchance kill a man, this is ſaid to be murther, for the Act was unlawful. So if a man doth beat another, and with intent not to kill him, yet if the party be killed by this battery, it is felony.

So if two are fighting together, and a third cometh to part them, and is killed by one of them two, without any malice forethought, yet this is murther in him, and not Homicide by Chancemedley, or miſadventure, becauſe that they two that fought together, were in doing of an unlawful Act. And if they were met with prepenſed malice, the one intending to kill the other, then it is murther in them both.

11. H. 7. 23. a.

2. Touching an evil Intent: If a man knowing that many people come in the ſtreet from a Sermon, throw a ſtone over a wall, intending only to fear them, or to give them a light hurt, and thereupon one is killed, this is murther, for he had an evil intent, though that intent extended not to death, and though he knew not the party ſlain.

Note, though the killing of a man by miſadventure, or by chance, be not felony, *Quia in maleficiis voluntas ſpectatur, non exitus. D.* 48. 8. 14. yet the party guilty ſhall forfeit

Co. 3. Inſt. f. 57.

forfeit therefore all his Goods, and Chattels, to the intent that men ſhould be cautious, as they tend not to the effuſion of mans blood: I ſhall conclude this learning touching Homicides, with ſomewhat appertaining to Phyſicians and Chirurgians.

If one that is of the myſtery of a Phyſician, take a man in Cure, and giveth him ſuch Phyſick, as within 3 dayes he dies thereof without any felonious intent, and againſt his will, it is no Homicide: But *Briton* (cap. 5. *De Homicides*,) ſaith, that if one who is not of the myſtery of a Phyſician or Chirurgion, take upon him the Cure of a man, and he dieth of the potion, or Medicine, this is, ſaith he, Covert felony. In the Civill Law it is thus: *Medico imputari eventus mortalitatis non debet: Ita quod per imperitiam commiſit, imputari ei debet, prætextu humanæ fragilitatis delictum decipientis in periculo homines inoxium eſſe non debet.* Co. 3. Juſt. 117. D. S 18. 6. 7.

Imperitia culpæ adnumerentur: veluti ſi Medicus ideo ſervum tuum occiderit, quia male ſecuerit: aut perperam ei medicamentum dederit; Juſt. 4. 3. 7.

Thus much of the Pleas of the Crown, that have relation to the life of man; I proceed now to thoſe that reſpect the body and members.

2. *Of those Crimes, that appertain to mans body, or members, and they are* Battery, Mayhem, *and* Rape.

1 Of Battery.

Battery, is when a man assaulteth and beateth another, this is against the Law and Peace of the Realm, which ordaineth, that no man shall be his own Judge, or revenger of his own private wrong, but shall leave this to the Censure of the Law; (And this is agreable to the Roman Laws: Cod. 3. 5. 1. *Generali lege decernimus, neminem sibi esse judicem vel jus sibi dicere debere. In re enim propria iniquum admodum est alicui licentiam tribuere sententiæ.* Again: D. 50. 17. 176. *Non est singulis concedendum, quod per Magistratum publice possit fieri, ne occasio sit Majoris tumultus faciendi*: wherefore he that is so beaten may indict the other party, who upon it shall be fined to the King: But some there are that may in a reasonable and moderate manner chastise, correct and beat others.

1. In respect of power, proceeding from the Law of nature, as Parents may correct their own Children.

2. In respect of Authority œconomical, as the Master may chastise his Servant, or Apprentice.

3. In respect of power arising from Civil Justice; as the Gaoler and his servant, the unruly prisoners; the Officers, him that is arrested,

arrested, and will not otherwise obey.

Also a man may justify the beating of another, in defence of his own person, or of the person of his Wife, Father, Mother, or Master: But when any is assaulted, or beaten in Church, or Churchyard, it is not lawful for him to return or give any blows in his own defence, as he may elsewhere in other places. Cro. 2. part Frances. v. Leg.

Mahim, or maime (*Mahemium*) cometh of the old French (*Mehaigne*) a Maime a corporal hurt, whereby a man loseth the use of any member. The Canonists call it *Membri mutilationem*, or *Mayhem*, is where by the wrougful Act of another any member is hurt or taken away, whereby the party so hurt is made unperfect to fight: As if a bone be taken out of the head: or a bone be broken in any other part of the body, or foot, or hand, or finger, or joynt of a foot, or any member be cut: or by some wounds the sinews be made to shrink or other member, or the fingers made crooked, or if any eye be put out, or the foreteeth broken, or any other hurt in a mans body, by means whereof he is made the lesse able to defend himself, or offend his enemy: But the cutting of an ear or * nose, or breaking the hinder teeth, or such like, is no *Mayhem*, because it is rather a deformity of the body, then diminishing of strength, and that is commonly tryed by beholding the party by the Justices. And if the Justices stand in doubt, whether the hurt be a *Mayhem* or not, they use, and will

2. Of Mahim. Co. Lit. 126. a. F. 288. a.

* *Note, that to cut maliciously the nose of another, is made felony, by a Law enacted in the Reign of his now Majesty.*

will of their own discretion, take the help and opinion of some skilful Chirurgeon, to consider thereof, before they determine upon the Cause.

Co. Lit. 127. *a, b.* But whether a man may be indicted for maiming himself? To this it answered, that he may; As it appears in the Case of one *Wright*, *anno* 11. *Jac.* in the County of Leicester; who being a yong, strong, and lusty rogue, to make himself impotent, thereby to have the more colour to beg, or to be relieved, without putting himself to any labor, caused his Companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefore, and that by the opinion of the rest of the Justices, for the members of every subject are under the safeguard and protection of the King, to the end that they may serve the King, when occasion shall be offred, and therefore not in the power of a subject to maim or hurt his own body or limbs, or to cause another to do it. And this is agreable to the Civil Law, *Nemo membrorum suorum est dominus: Liber homo suo nomine utilem aquiliæ habet actionem: directam enim non habet; quoniam dominio membroeum suorum nemo videtur.*

D. 9. 2. 13.

By the ancient Law of England, he that maimed any man, whereby he lost any part of his body, the Defendant should loose the like part, (as he that took away another mans life, should loose his own) And this was grounded upon the Law of God, *Levit.* 24. *v.* 18, 19. 20. *Deut.* 19. *v.* 21. It

Co. 3. Instit. 118.

is

is called among the Latines *Lex Talionis*, or *Reparationis*, among the *Greeks*, Ἀντιπεπονθὸς, *per quam quis patitur, quod alteri fecit.*

This offence of *May'em* is under all felonies deserving death, and above all other inferiour offences, so as it may be truly said of it, that it is, *Inter crimina majora minimum & inter minora maximum.* Co. Litt. 127. a.

Rape, is the violent deflouring of a Woman against her will; and this offence is felony, as well in the principal, as in his Aiders. *vide* 11. *Hen.* 4. *c.* 13. 1. *E.* 4. *c.* 1. *West.* 2. *c.* 13. *Cromptons* Justice of Peace *f.* 43, 44. But my Lord *Coke* defines it thus: It is when a man hath carnal knowledge of a woman by force, and against her will, or Rape is felony by the Common-Law, declared by Parliament for the unlawful and carnal knowledg, and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years, with her will, and the offender shall not have the benefit of Clergy. *Vide* 18. *Eliz. c.* 6. 3 Of Rape. Co. Litt. 123. *b.* Co. 3. Instit. *f.* 60.

If the party that is ravished, conceive by the Ravisher a child at the time of the Ravishment, this is no Rape, because she could not conceive, unless she assent. Stamf. 24.

Bracton in 24*th* chapter of his third book sheweth, that by the Antique Law of King *Athelstan*, He that meeting a Virgin *sole*, or with company, did but touch her unhonestly, was guilty of breaking the Kings Edict; If against her will, he threw her on

the ground, he loſt the Kings favour; if he diſcovered her, and caſt himſelf upon her, he loſt all his poſſeſſions: if he lay with her, he ſuffereth Judgement of life, and member: yea, if he were an Horſe-man, his horſe loſt his tail and main. His hawk likewiſe loſt her beak, Tallons and train. And the Virgin had in recompenſe all his Land and money by the Kings Warrant. This was in the King *Atheſtans* dayes; But in *Bractons* time, it ſeemeth that theſe kind of Raviſhers were otherwiſe puniſhed, they loſt their eyes and privy members. *Co. Litt.* 123. *b.* 29. *H.* 6. *Tit. Coron.* 17. *Bracton lib.* 3. *f.* 147.

l. 48. 6. The Civil Law: *Punitur Lege Julia de vi publica, qui puerum, vel fœminam, vel quemquam per vim ſtupraverit.*

Hitherto of the offences, that touch the body and members; *viz.* Battery, Mayhem, and Rape.

3. *Of thoſe Offences that diſpoil men of their property.*

Thoſe Crimes or Pleas of the Crown, that deprive others of their property, are two, §. *Furtum*, or Theft, and Burning of Houſes.

1. *Of Theft.*

In Theft are to be conſidered 3. things, the Etymology of the word *Furtum*, the definition, and its ſeveral kinds.

Furtum,

Furtum, a furvo, id est, nigro dictum Labeo ait: quod clam & obscuro fiat, & plerumque nocte, vel a fraude, ut Sabinus *ait: vel a ferendo & auferendo: vel a Græco sermone, qui Φῶρας appellant fures: Imo & Græci ἀπὸ τοῦ Φέρειν, id est, a ferendo Φῶρας dixerunt.* 1. The Etymology. D. 47. 2. 1. Just. 4. 1, 2.

Bracton thus defines it, *Furtum est secundum Leges, contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo Domino, cujus res illa fuerit. Lib:* 3. *f.* 150. 1. The definition.

The Civilians thus: *Furtum est contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve, quod lege naturali prohibitum est admittere.* Just. 4. 1. 1. D. 4. 7. 2. 1. 3.

That Theft is forbidden by the Law of nature, is manifest by these Authors.

1. Cicero: *In vita sibi quemque petere quod pertineat ad usum non iniquum est: alteri surripere, jus non est.*

Theft generally taken, doth comprehend *Larceny, Robbery, Burglary*, and *Pyracy*: of these in order. 3. Its species or kinds.

1. *Of Larceny.*

Larceny, by the Common Law, is the felonious and fraudulent taking, and carrying away by any man or woman, of the meer personal goods of another, neither from the person, nor by night in the house of the owner: This Larceny is twofold, the one so called Simply, and the other Petit, or Little Larceny. Co. 3. Inst. 107.

The first is where the thing stollen ex-

ceeds the value of 12. pence, and that is felony.

The other (which is called little, or petit Larceny) is where the thing ſtollen doth not exceed the value of 12. pence, and that is not felony.

From the Deſcription and Diviſion of Larceny, I proceed to propoſe theſe following Queries, with Reſolutions on them.

Quæſt. Whether Larceny can be committed, where there is a Bailement, or Delivery, by the owner of the thing?

Reſp. Larceny is perpetrated by an actual taking: for an Indictment, *Quod felonice abduxit* is not good, becauſe it wanteth *cæpit*. By taking, and not Bailement or delivery, for that is a Receipt, and not a taking: and therewith agreeth *Glanvil*, *Furtum non eſt ubi initium habet detentionis per dominum rei*; But this Rule of *Glanvil* has its exceptions, as appears by theſe Caſes in our Law. If a Carryer hath a bale or pack of Merchandiſe delivered unto him to carry it to an appointed place, and after he take the whole pack *animo furandi*, this is Larceny: for the delivery had taken his effect, and the privity of the Bailement is determined; ſo if he open the pack, and take any thing out * *animo furandi*, 'tis Larceny.

Lib. 10. c. 13.

Co. 3. Inſt. 107. 13.E. 4.9.

*Furtum ſine affectu furandi, non committitur: Juſt. 4. 1. 7.

If a Taverner ſet a piece of plate before a man to drink in it, and he carry it away, this is Larceny: for it is no Bailement, but a ſpecial uſe to a ſpecial purpoſe.

13.E. 4.9. *Perkins* ſect. 191.

To conclude, our Law does make a diſtinction between a Poſſeſſion and a Charge; for

for when I deliver goods to a man, he hath the poſſeſſion of the goods, and may have an Action of Treſpaſs, or an Appeal, if they be taken or ſtoln out of his poſſeſſion. But my Butler or Cook, that in my houſe hath charge of my veſſel or plate, hath no poſſeſſion of them, nor ſhall have an Action of Treſpaſs or an Appeal, as the Baily ſhall, and therefore if they ſteal the plate or veſſel, it is Larceny: And ſo it is of a ſhepheard, for things be *in onere*, *& non in poſſeſſione Promi*, *Coci*, *Paſtoris*, *&c.*

21. H. 7. 15, 2, 12. H. 7. 15. 2. 3 H 7. 12. Cro. 1. part *Holiday.* vers. *Hickes.* 638.

Whether of goods found and converted *animo furandi*, Larceny can be committed?

Quæſt. 2.

If one looſe his goods, and another find them, though he convert them *animo furandi*, to his own uſe, yet it is not Larceny, for the firſt taking is lawful.

Reſp.

So if one find Treaſure Trove, Waif, or Stray, and convert them *cum affectu furandi*; it is no Larceny, both in reſpect of the finding, and alſo for that *Dominus rerum non apparet*: *And non eſſe*, *& non apparere tantundem valent quoad eum*, *cui non apparet.*

22. Aſſ. pl. 99. 22. c 3. Cor. 265.

Whether an Infant, that is under the age of diſcretion, can commit Larceny?

Quæſt.

An Infant, until he be of the age of 14, which in Law is accounted the age of diſcretion cannot commit Larceny, or other felony; for the principal end of puniſhment is, that others by his example may fear to offend: But ſuch puniſhment can be no example to Infants, that are not of the age of diſcretion:

Reſp.

Co. Litt. 247. b. Co. 3. Inſt f. 4, & 108.

But

But it appears by *Lambard f.* 2. *nu.*7. that the Law was heretofore thus: *Infans decem annorum furti reus censeatur.* But having given you a determination according to our Law, I will mention the Law of the *Romans* and *Greeks.*

1. The Civil Law: *Quæsitum est. an Impubes rem alienam amovendo, furtum faciat? Et placuit, quia furtum ex affectu furandi consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, & ob id intelligat se delinquere.*

Just. 4. 1. 14.
D. 47. 2. 23. De furtis.

Impuberem furtum facere posse, nisi jam dolis capax sit, Julianus lib. 22. Digest. scripsit. for *Ætatis habetur ratio in delictis.*

2. The Law of the *Greeks: Ælian lib.* 5. *cap*, 16. *Varr. Hist.* hath this story: When a certain Boy, who had stoln away a golden plate, that fell from *Diana's* Crown, was brought in Judgment before the *Areopagitæ*: Those Judges, caused *Cocke-Hall, Bones, Rattles*, and the golden plate to be laid before the Child, in whom perceiving an inclination again to the golden plate, rather then to the Rattles and other things more suitable to his childhood, without pitty to his Infancy, they condemned him to death, as a Sacrileger, thinking it fit to crop that sin and wickedness, which they discerned to be in him, being yet but in the blade, and herbe.

Quæst. 4. Whether a Feme Covert can be guilty of Larceny?

Resp. If a man and his wife commit Larceny joyntly, the feme can neither be principal nor

nor accessary, but it shall be wholly adjudged the husbands fact, because the Law intends her to have no will, in regard of the subjection and obedience she owes to her husband: But a woman by her self, without the privity of her husband, may commit Larceny or other felony, to become either principal or accessary: As if she steal goods, or receive thieves to her house, &c. and if the husband as soon as he perceives it, waive and forsake their company and his own house, in this case the womans offence makes not felony in the Baron. But if the Baron commit felony, his wife not ignorant of it, may keep his company still notwithstanding, and not be declared accessary.

Stamford. 26. 2. E. 3. Cor. 160. *Fitzh.* The Womans Lawyer lib. 3. sect. 43.

Note, that a woman cannot be thief of her husbands goods, if she take and give them away, the Receiver is no felon.

Stamford lib. 1. c. 19.

Whether Larceny can be committed of a thing, that is delivered by Replevin.

Quære 5.

If a man seeing the horse of B. in his pasture, and having a mind to steal him, comes to the Sheriff, and pretending the horse to be his, obtaineth the horse by Replevin, yet this is a felonious and fraudulent taking, as it was resolved by the Judges, as *Catlin* Chief Justice reported in the Kings Bench *Pasch.* 15. for the Replevin was obtained *in fraudem Legis*; *And fraus Legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit.*

Resp. Co. 3. Inst. 108. Co. 2. Inst. 242. Co. lib. 13. *Sprat* and *Heales.*

Whether the removal of things *felleo animo*, from one room to another, in the same house, can be Larceny?

Quære 6.

The removing of things taken, though they

Resp.

they be not carried away, is Larceny as if a Gueſt take the coverlet or ſheets of his bed, and riſing before day, take the coverlet or ſheets out of the chamber, where he lay, into the Hall, to the intent to ſteal them, and went to the ſtable, to fetch his horſe, and the Hoſtler apprehended him, and this was adjudged Larceny: and the coverlet or ſheets were carried away, to the Hall, albeit they were ſtill in the houſe of the owner.

21. Aſſ. Pl. 39. Co. 3. Inſt. 108. & 109.

So if a mans horſe be in the cloſe, and one taketh him, and as he is carrying him away he is apprehended, before he getteh out of the cloſe, yet this is ſufficient to to make it Larceny.

Juſtice *Daliſons* Report.

Quære 7. Whether Larceny can be commited of perſonal goods, that ſavour any thing of the Realty?

Reſp. Of perſonal goods, if they ſavour any thing of the Realty, no Larceny can be committed, as taking apples out of an Orchard, growing upon the tree, or graſs ſtanding on ground, *&c.* though they be taken with a felonious intent, is not felony, for that they are parcel of the freehold: But if the owner cut the graſs, or gather the fruit, then Larceny may be committed of them.

So it is of a Box or Cheſt with Charters, no Larceny can be committed of them, becauſe the Charters concerne the Realty, and the Box or the Cheſt, though it be of great value, yet ſhall it be of the ſame nature, the Charters be of: *Et omne majus dignum trahit ad ſe minus.*

10. E. 4. 14. Co. lib. 8. *Caſe.* 33. *b.*

Whether

Whether Larceny can be committed of Winding ſheets about dead Bodies? Quære 8

At the Aſſizes at *Leiceſter*, the Caſe was this: One William Haine had in the night digged up the Graves of divers ſeveral perſons and took the Winding ſheets from the Bodies, and buried the Bodies again: and Sr. *Edward Coke*, adviſing hereupon for the rareneſs of the Caſe, conſulted with the Judges at Serjeants-Inn in *Fleet ſtreet*, where they all reſolved, That * although the dead Body is not capable of any property, yet the property of the ſheets muſt be in ſome body, and therefore in the Executors, Adminiſtrators, or other owner of them: And according to the Judges reſolution, he was indicted of felony at the next Aſſizes, but the Jury found it but petit Larceny, for which he was whipped, as he well deſerved. Reſp. 10. *Jac. Regis*; *Haynes* Caſe. * *Mors eſt, cum quis e vivis exceſſit, quâ jus omne extinguitur quod perſonæ coheret.*

Whether a man may commit Larceny of his own goods? Quære

If a man doth Baile or ſend his goods to another, although he hath the general property, yet may he commit Larceny of them, by the felonious taking and carrying them away, and in Judgment of Law, is ſaid in this Caſe to take the goods of another: For the Bailer hath *Jus proprietatis*, and the Bailee hath *Jus poſſeſſionis*, or a ſpecial property. But let us ſee what the Civil Law ſaies in ſuch Caſes. Reſp. 7. H. 6. 43. Cro. 1. part. *Staford. Vide Poole.* Co. 3. Inſt. f. 110.

Aliquando etiam ſuæ rei furtum quis committit: veluti ſi debitor rem, quam Creditori pignoris cauſa dedit, ſubtraxerit. Inſt. 4. 1. 12.

Si

D. 47. 2. 59. De Commodato.

Si is qui rem commodaſſet, eam rem clam abſtuliſſet, furti cum eo agi non poteſt, quia ſuum recepiſſet, & ille commodati liberatus eſſet. Hoc tamen ipſa accipiendum eſt ſi nullas retinendo cauſas is cui commodata res erat, habuit. Nam ſi impenſas neceſſarius in rem commodatam fecerat, interfuit ejus potius per Retentionem eas ſervare, quam ultro commodati agere. Ideoque furti actionem habebit. Thus much of Larceny.

1. *Of Robbery.*

Robbery is (ſaies *Coke*) a felony by the Common Law, committed by a violent aſſault, upon the perſon of another, by puting in fear, and taking from his perſon his money or other goods of any value whatſoever: Or it is (ſaies another) a felonious taking away of another mans goods from his perſon or preſence, againſt his will, putting him in fear, and of purpoſe to ſteal the ſame goods. We call it *Roberia, & Rapina*, and the Thief *Raptor*.

Out of which deſcriptions, the Reader may obſerve theſe ſpecial circumſtances: 1. That itis not Robbery, unleſs the party be put in fear, as by aſſault and violence; And this circumſtance of fear, maketh the difference between a Robber and a Cut-purſe: both take it from the perſon, but this latter takes it *clam & ſecrete*, without aſſault, and putting in fear, The lattter by violent aſſault, and putting in fear.

5. Eliz. Dyer 224. b.

2. That the word (*taking*) neceſſarily implyerh

implyeth that the Robber must be in possession of the thing stoln; for example, If the bag or purse of the true man be fastned to his girdle, &c. and the Robber more easily to take the bag or purse, do cut the girdle, whereby the bag or purse, falleth to the ground, this is not taking, for the Thief had never any possession thereof; but if the Robber had taken up the bag or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it in his possession; for the continuance of his possession is not required by Law. Co. 3. Inst. f. 69.

3. Though Robbery is so called, because the goods are taken de la robe, from the Robe, that is from the person; yet if the true man seeking to escape for the safeguard of his money, cast it into a bush, which the Robber perceiving; This is a taking in Law from the person, because it is done at one time. 14. E. 3. Cor. 115.

But, the *Quære* may be, Whether the Thieves reception only by such a taking in Law, as to make it Robbery? It is answered, That a Thief's reception will make it Robbery; As if Thieves rob a true man, and find but little about him, take it, this is an actual taking, and by means of death, compel him to swear upon a book to fetch them a greater sum, which he doth, and deliver unto them, which they receive, this is a taking in Law by them, and adjudged Robbery; for fear made him to take the oath, and fear continuing, made him bring the money, which amounteth to a taking in Law. 44. E. 4. 14. 4, H. 4. 2.

4, and

14. E. 3. Cor. 115. 22. Ass. pl. 39.

4, and lastly: That an assault only to rob without taking some money or goods is no felony, for somewhat must be taken.

Just. 4. 2. De vi bonorum raptorum.

Touching Robbers take somewhat of the Civil Law, *Qui vires alienas rapit, tenetur quidem etiam furti: Quis enim magis alienam rem invito domino contrectat, quam qui vi rapit?*

D. 47. 8. 5. De restitutione rei.

Non prodest ei qui vi rapuit, ad evitandam pœnam si ante judicium restituat rem quam rapuit: Multo minus (saies *Gothofredus* on this Text) *si pœniteat post delictum; vere enim ad evitandam pœnam sola pœnitentia sufficit. Cur? plus est rem restituere, quam pœnitere, & ita tenent Doctores omnes communiter.*

Thus much of the offence called in our Law Robbery.

3. *Burglary.*

Touching *Burglary*, there are 3 matters worthy of observation: *viz.* 1. The Etymology or origination of the word. 2. Its Definition: 3. Resolutions concerning this offence.

1. The Etymology.

The word *Burglary*, is derived of two words *Burgh* and *Laron*, *Burgh* signifying an House, and *Laron* signifying a Thief, as it were a House Thief.

Co. lib. 4. f. 39. *Brooke's* Case.

This crime, according to the acceptance of our Common Law is thus defined.

It is when one breaketh and entereth into the house of another in the night, with a felonious intent to rob or kill, or to do some other felony; in which cases, although he carry

carry away nothing, yet it is felony, for which he ſhall ſuffer death.

The Reſolutions that are given upon this offence, are theſe following.

1. Touching fraction and entry: If the door of a manſion houſe ſtand open, and the Thief enter into the houſe with a purpoſe to ſteal, this is a breaking of the houſe in Law, and no Burglary, becauſe there muſt be an actual breaking, for the words of the Indictment are, *Felonice & Burglariter fecit, &c.* which are to be underſtood of an actual breaking of the houſe, and not of a breaking in Law. So it is if the window of the houſe be open, and the Thief with a hook, or other engine draweth out ſome of the goods of the owner: this is no Burglary, becauſe there is no actual breaking of the houſe But if the Thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner; this is Burglary, for there was an actual breaking of the houſe. 4. The Reſolutions. Co. 3. Inſt. 64.

If divers come in the night to do a Burglary, and one of them breaketh and enter, the reſt of them ſtanding neer to the door, or about other part of the houſe, *&c.* to watch that no help ſhall come to defend the owner, this is Burglary in all. 13. H. 4. 13.

But ſometimes Burglary may be committed by entry without any breaking: For example; if a ſervant will conſpire with other men to rob his Maſter, and to that intent

he openeth his Masters doors and windows in the night for them, that they come into the house by that way, this is Burglary in the strangers, and the servant is a thief; but no Burglar. And this was the opinion of *Manwood* Chief *Baron* of the *Exchequer*, at the Quarter Sessions holden at *Canterbury* in January 1579. 21. *Eliz.*

2. *Touching Mansion houses.*

If upon accident a man and all his Family are out of the house, and one in the *interim* breakes the house, and commit felony, it is Burglary, although neither the owner nor any of his Family is in the house, for the Indictment of Burglary is *Domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis*: And so it was resolved 38. of *Eliz.* where a man hath two mansion houses, and servants in both, and in the night when the servants are out, *&c.* the house is broken, tis Burglary.

Co. Lib. 4. Brokes Case. f. 39.

But whether a Church, a Booth in a Fair, or a Chamber of an Inns of Court, may be termed *Domus mansionalis?* It is answered;

1. As to a Church: If a man do break and enter into a Church in the night with intent to steal, this is Burglary, and Sacriledge; for *Ecclesia est domus mansionalis Omnipotentis Dei.*

Concerning this horrible crime of Sacriledge, I shall present some learning out of *Justinian* and *Seneca.*

Sunt Sacrilegi qui publica Sacra compilaverunt.

verunt. At qui privata Sacra, vel Ædiculas incustoditas temptaverunt, amplius quam fures, minus quam Sacrilegi, merentur. D. 48. 13. 9. 1. Qui sunt Sacrilegi vel non.

Quisquis id, sayes *Seneca*, *quod Deorum est, sustulit & consumpsit, atque in usum suum convertit*, Sacrilegus est.

Sacrilegii pœnam debebit Proconsul pro qualitate personæ, proque rei Conditione, & temporis, & ætatis, & sexus, vel severius vel clementius statuere. Et scio multos & ad bestias damnasse Sacrilegos: nonnullos etiam vivos exussisse, alios vero in furca suspendisse. D. 48. 13. 6. Sacrilegi capite puniuntur. D. 48. 13. 9. Pœnas Sacrilegii.

2. *As to a Booth or Tent.*

A Tent or Booth in a Fair or Market, is not *Domus mansionalis*, but of another name or kind; but that is provided for by the Statute 5. E. 6. c. 9. whether the robbery be done in the night or in the day, the owner, *&c.* being within the same, sleeping or waking.

3. *As to Chambers, belonging to Inns of Court.*

A Chamber of an Inns of Court, or Chancery broken open, is said to be *Domus mansionalis* of him who is the owner of the said Chamber. Cro. 3. part. *Evans* and *Finches* Case.

Thus much touching the Mansion houses.

3. *Touching the intention of the Party.*

If a man be Indicted, that he in the night time did feloniously break the house of *I. S. ad verberandum ipsum I. S.* this is no Burglary, because it was but to beat, and not to kill; But if it were *ad interficiendum I. S.* then it is Burglary, though he never touched him, for the intent must be to commit felony, and not trespass or other thing, that is not felony.

13. H. 4. 7.

4. *Touching that which is perpetrated* In fraudem Legis.

If Thieves come in the night with hue and cry, pretending that they be robbed, and shall require the Constable to search for the felons, and whilst he goeth with them into some mans house, they bind and rob the Constable and dwellers, this is Burglary; for in Judgment of Law, it is their act; and that which is done *in fraudem Legis*, the Law giveth no benefit thereof to the Party.

Co. 3. Inst. f. 64.

You see by what has been said before, that Burglary the Common Law restrains to a robbing of a house, by night or breaking in, with intent to rob or to do some other felony; but the like offence committed by day, we call House-breaking, or Robbing, (and not Burglary) and this kind of felony is provided for by the Stat. of 39. *Eliz.* That if any man shall break a house by day, and

39. Eliz. c. 15.

and take away thence money or goods, to the value of five ſhillings, or more in any part of the dweling houſe, or Out-houſe, belonging to the ſame, though no perſon be therein, for this felony he ſhall loſe the benefit of his Clergy; ſo as for this offence the party ſhall ſuffer death, as in caſe of Burglary

Upon this *Law*, happened this Caſe following:

Evans and *Finch* were arrigned at the Gaole delivery of New-Gate: for that they about 12. a clock in the fore-noon, brake open *Domum manſionalem Hugonis Audeley*, in the Inner Temple, no perſon being in the ſaid houſe, and ſtole from thence 40. pounds. And upon evidence it appeared, that the ſaid *Evans* by a ladder climbed to the upper window of the ſaid *Audeley*'s chamber, and took out thereof the ſaid 40. pounds: And that the ſaid *Finch* ſtood upon the ladder in the view of the ſaid *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting to the committing of the ſaid robbery, and took part of the money. And all this matter being found, it was adjudged, becauſe the ſaid *Finch* did not enter into the chamber, that he was not within the Statute of 39. *Eliz.* which takes away Clergy, where an houſe is broken open, and the robbery is above the value of five ſhillings, no perſon therein, that he ſhould have his Clergy, which was allowed him. And as for *Evans* the ſpecial verdict found, that he was in

Cro. 3. part. *Evans* and *Finches* Caſe.

the chamber of *Hugh Audeley*, in the Inner Temple, and that the robbery was committed between 12, and one of the clock in the day time, no person being within the chamber at the time of the breaking thereof, but that divers persons were in the Inner Temple Hall, and in other places of the house: And whether this be a breaking open the house, and taking of goods above the value of five shillings; *nulla persona*, being within the house, and within the said act of 39. *Eliz.* they prayed the discretion of the Court? And it was resolved upon this special verdict (being removed by *Certiorari* into the Kings Bench, and the prisoner removed by *Habeas corpus*) that this breaking open the chamber, and taking 40. pounds out thereof, *nulla persona* being therein (although there were divers persons in other parts of the house) was within the Stat. of 39. *Eliz.* which takes away Clergy from such offenders: Wherefore Clergy was denyed to the said *Evans*, and Judgment given in the Kings Bench, that he should be hanged.

Thus much of *Burglary*, and likewise of House-breaking.

4. *Pyracy.*

Co. Lit. 391. *a.* 3. Instit. *f.* 113.

The word *Pyrat*, in Latine *Pirata*, is derived from the Greek word πειρατης, which again is fetcht from πειραν, *a transeundo mare*, of roveing upon the Sea, and therefore in

in Englisſh a *Pyrate* is called a Rover, and a robber upon the Sea.

Having ſhewed the Etymology, I propound theſe Queſtions with their reſolutions touching Piracy.

Whether Piracy were anciently treaſon? Qu. 1.

Before the Statute of 25. E. 3. c. 2. *De proditionibus*, if a Subject had committed Piracy upon another, this was holden to be Petit treaſon, for which he was to be drawn and hanged: becauſe *Pirata eſt hoſtis humani generis*, and it was *contræ Ligeantiæ ſuæ debitum*; but ſince the aforeſaid Satute, this is no treaſon in the caſe of a Subject. Reſp. 40. Aſſ. pl. 25.

Whether Piracy can alter property? Qu 2.

Piracy does not change property no more then theft at Land. *Hobart*'s Reports *f.* 78. Reſp.

When goods are tortiouſly taken upon the Sea by Piracy, it gaineth not any property in them againſt the owner; and being ſold on the Land, unleſs it were in Market overt, doth not alter the property. Cro. 1. part. *Anonymus f.* 685.

The Civil Law ſpeakes thus:

A Piratis, aut latronibus capti, liberi permanent. D. 49. 15. 19. 2.

Qui a latronibus captus eſt, ſervus latronum non eſt, nec poſt liminium illi neceſſarium eſt. D. 49. 15. 24.

Piratæ, quæ capiunt, non mutant dominium. Grotius l. 3. *c.* 9. *n.* 16. *De jure belli.*

Whether Attainder for Piracy doth work corruption of blood, or forfeiture of Lands? Qu. 3. Reſp.

If Piracy be tryed before the Lord *Admiral* in the Court of the *Admiralty*, according to the Civil Law, and the delinquents

there attainted, yet shall it work no corruption of blood, nor forfeiture of his Lands, otherwise it is, if he be attainted before Commanders by force of the Statute of 28. *H.* 8. *c.* 15.

Qu. 4. Whether a Pardon of all felonies shall extended to Piracy?

Resp. About the end of the Reign of Queen *Elizabeth*, certain English Pirates that had robbed on the Sea Merchants of *Venice* in amity with the Queen, being not known, obtained a Coronation Pardon, whereby amongst other things, the King pardoned them all felonies: It was resolved by all the Judges of *England*, upon conference and advisement, that this did not pardon the Piracy; for seeing it was no felony, whereof the Common Law took Conusance, and the Stat. of 28. *H.* 8. did not alter the offence, but ordained a Tryal, and inflicted punishment; therefore it ought to be pardoned especially, or by words, which *tantamount*, and not by the general name of felony; and according to this Resolution, the delinquents were attainted and executed. Thus much of *Piracy*.

Co. Lit. 39. *a.*

Hill. 2. *Jac. Regis.*

5. *Burning of Houses.*

Burning is a felony at the Common Law, committed by any that maliciously and voluntarily in the night or day, burneth the house of another.

Co. 3. Inst. *f.* 66.

Out of which we may observe two circumstances. First;

First; To make it felony, it must be done with malice and will; for if it be done by mischance, or negligence, it is no felony. But whether the Law doth sometime imply that the house was burnt maliciously, and voluntarily, may be a *Quære?* It is answered, it does: As if one intend to burn the house of A. only, and not the house of B. and yet in the burning the the house of A. the house of B. is burnt, in this case the burning of the house of A, is felony, because it proceeded of the malicious and voluntary burning of the house of A, and the event shall be coupled to the cause, which was voluntarily and malicious: And the rule is, *Involuntarium ex voluntario orum habens, moraliter pro voluntario habetur.* Co 3. Inst. *f.* 67. *Plowd.* Com. *f.* 475.

Secondly; to make it felony, it must be the house of another, and not his own house: As for example:

One *W. Holmes* was indicted in *London*, for that he being possessed of an house in *London*, in *Throgmorton* street, in such a ward for six years, the remainder to *I.S.* for three years, the Reversion to the Corporation of *Haberdashers* in fee: He *vi & armis felonice, voluntarie, & malitiose igne combussit, &c.* his own house: Upon this being arraigned at *New-Gate*, he was found guilty: add before Judgment this Indictment was removed by *Certiorari* into the Kings Bench, and being argued by *Grimston*, that it was not felony. Cro. 3. part. *Holmes's* Case. *f.* 377.

By *Richardson*, *Jones*, and *Berkeley* it was held

held that it was not felony to burn an houſe, whereof he is in poſſeſſion, by vertue of a Leaſe for years: For they ſaid, that burning of houſes is not felony, unleſs that they were *ædes alienæ*: And therefore *Britton*, and *Bracton* mention that is felony to burn the houſe of another: and the Year-Books and *Co. lib.* 11. *Powlters* Caſe, which ſay, that burning of houſes generally are to be intended *de ædibus alienis, & de non propriis*: And although the Indictment be *ea intentione ad comburendum felonice, &c.* yet intent only without fact, is not felony: Alſo *Barkeley* and *Jones* held, that it cannot be ſaid *vi & armis*, when it is in his poſſeſſion; and therefore it was reſolved that it was not felony, wherefore he was diſcharged thereof: But becauſe it was an exorbitant offence, and found, they ordered that he ſhould be fined 500. pounds to the King, and impriſoned during the Kings pleaſure, and ſhould ſtand upon the Pillory, with a paper upon his head, ſignifying the offence at *Weſtminſter*, and at *Cheap-ſide*, upon the Market day, and where he committed the offence, and ſhould be bound with good ſureties to his good behaviour during life.

22 & 23. *Car.* 2. nunc Regis. Note, there is a late Act made, to prevent the malicious burning of houſes, Stackes of Corn and Hay, and killing and maiming of Cattel.

Touching burning, the Civil Law ſpeaks thus:

D. 47. 9. 9. *Qui ædes acervumque frumenti juxta domum*

mum positum combusserit, vinctus verberatus, igni necari jubetur, si modo sciens prudensque id commiserit. Si vero casu, id est, negligentia, aut noxiam sarcire jubetur, aut si minus idoneus sit, levius castigatur.

Si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut Luxuriæ, aut dolo sit proxima: Hitherto of criminal Pleas, that are perpetrated against the King and Common-wealth mediately, but *principaliter in singulas personas.* D. 49. 9. 11.

I proceed to those that immediately touch the King, and his Crown; and they are:

1. *High Treason.*

Crimen læsæ Majestatis.

Stamford telleth us that the King is the Preserver, nourisher and defender of all his People, and that by his great travel, study and labour, his People only enjoy their Lives, Lands and Goods: And as the body of Man cannot live without a Head, but will fall to the ground, so the Realm cannot be governed without a Head; which is the King. Agreable to that of *Seneca, Ille est vinculum, per quod Respublica cohæret, &c.* And therefore we his loving Subjects, are obliged to watch for that him, wakes for us; And, *primum virtutis opus est, servare servantem cætera.*

If so, what an abominable thing must it be, to be a violator of Kingly Majesty: Crime de Majesty (sayes the *Mirror*) est un perbe horrible fait al Roy, &c. *Tacitus* calls *Crimen Majestatis, vinculum, & necessitatem silendi; Omnium accusationum complementum:*

mentum: And in the Civil Law, it is ſaid thus: *Proximum Sacrilegio crimen eſt, quod Majeſtatis dicitur. id eſt, crimini quo divina Majeſtas pulſatur.*

D. 48. 4. 1.

High Treaſon does extend to ſeveral parts or kinds, *viz.* Death, to Violation, to Leaving of Warr, to Adhering to the Kings Enemies, to Counterfeiting the Great Seal, Privy Seal, and the Kings Coyn, to the bringing into this Realm counterfeit Money to the ſimilitude of His Majeſties Coyn, of theſe ſeveral parts in their order.

1. *Touching Death.*

1. To compaſs or imagine the death of the King, is *Crimen læſæ Majeſtatis*, as appears by *Britton* and *Fleta.*

Britton thus: Grand Treaſon eſt a compaſſer noſtre mort.

Fleta hath this words: *Si quis mortem Regis auſu temerario machinatus fuerit, &c. quamvis voluntatem non perduxit ad effectum.*

To depoſe the King, or to take the King by force and ſtrong hand. and to impriſon him untill he hath yeilded to certain demands; this is a ſufficient overt Act, to prove the compaſſing and imagination of the death of the King: for this is upon the matter to make the King ſubject, and to deſpoil him of his Kingly Office of Royal Government. And ſo it was reſolved by all the Judges of *England Hill.* 1. *Jac. Regis*, in the

the Case of the Lord *Cobham*, Lord *Gray*, *Watson* and *Clarke* Seminary Priests.

So if divers conspire the death of the King, and the manner how, and thereupon provide weapons, powder, poyson, assay harness, send Letters, *&c.* or the like for execution of the Conspiracy, this is a sufficient overt act to prove the compassing and imagination of the Kings death.

If any man shall attempt to make himself so strong, that the King shall not be able to resist him, he is guilty of Rebellion. In the like manner, the Law interpreteth that in every Rebellion there is a machination against the life of the King and his deposing: For a Rebel will not suffer that King to live or reign, which may afterwards punish or revenge such the treason or Rebellion. These things are confirmed:

1. by the *Imperial* or Civil Law, whereby to do any thing against the safety of the Prince is holden to be treason. *Vide* D. 48.4. 1. *ad Legem Juliam Majestatis.*

2. By the force of reason, because it cannot be that which hath once given Law to the King, should ever permit that the King should recover his former Authority, or live, least at any time he should recover it.

3. By examples drawn out of our *English* History, as of *Edward* the Second, and *Richard* the Second, who being by force of Armes gotten by Subjects into their power, were not long after deposed also, and made away.

The

The Civil Law; *Quamvis regulariter ratione ſolius conſenſus nemo ad pœnam obligatur; ſed ſecuto demum actu: Aliud tamen obtinet in crimine in Principe, in quo voluntas, punitur; ſed intellige talem voluntatem, cum qua conjunctum eſt initium facti, i. e. factio, vel conjuratio: Sola enim & nuda voluntas puniri nequit.*

Note, that there is difference taken by our Law between felony and High treaſon; for it is not felony, unleſs there be ſome act done: *Non efficit conatus, niſi ſequatur effectus:* But if one compaſs or imagine the death of the King, who is the Head of the Common-wealth, and declares his compaſſing or imagination, by words or Writing, it is High treaſon: *Doct. and Stud. lib. 2. cap. 41. Co. 3. Inſt. f. 5. 12. H. 8. 36. b. 13. H. 8. 13. Bendlones Rep. Smith v. Spurle.*

And therefore theſe following words were adjudged High treaſon, *viz.*

If the King dye without Iſſue Male, that he would be King: and alſo the party arraigned ſpake, that if the King ſhould commit him to Priſon, that he would kill him with his dagger.

So one *Crohagan*, an Iriſh man was arraigned of Treaſon; for that he being the Kings Subject at *Lisbone* in *Spain*, uſed theſe words, I will kill the King (*innuendo Dominum* Carolum *Regem Angliæ*) if I may come unto him; and that in Auguſt 9. *Car. Regis*, he came into *England* for the ſame purpoſe. To this he pleaded Not-guilty, and

Cro. 3. part. *Crohagans* Caſe. *f.* 332.

and was tryed by a Jury of *Middlesex*, and it was directly proved by two Merchants, that he spake these words at *Lisbone* in *Spain*, in great heat of speech, with Captain *Baske*, and added these words, Because he is an Heretick; and for that his traiterous intent and the imagination of his heart, is declared by these words, it was held High treason by the course of the Common Law, and within the express words of the Statute of 25. *E.* 3. And he coming into *England*, and being arrested by Warrant for this cause, most insolently put his finger into his mouth, and scornfully pulling it out, said, I care not this for your King, *&c.* all which speeches and actions, though he now denyed; the Jury found him guilty, whereupon he had Judgment accordingly. He confessed that he was a *Dominican* Fryer, and made Priest in *Spain*. And although this, and his returning into *England*, to seduce the *Liege-People*, were Treason by the Stat. of 23. *Eliz.* yet the Kings Attorney said, he would not proceed against him for that cause, but upon the Stat. of 25. *E.* 3. of Treason.

So one *Henry Challercomb* was indicted of Treason for words, and was found guilty, and executed.

So *John Williams* was also indicted, found guilty, and executed, for writing a Treasonable Book, called *Balaam's Case*. These two last Presidents you may see cited in *Pyne's* Case, in *Croke's* third part of his *Reports*.

It

It is commonly said, That bare words may make an Heretick, but not a Traitor, without an overt Act: And therefore to make compassing by bare words or sayings, High treason, it must be by some particular Statute, such were the Statutes of 26. H. 8. c. 13. 1. E. 6. c. 13. 1. & 2. *Phil. and Mar.* c. 9. 1. *Eliz.* c. 6. 13. *Eliz.* c. 1. & 14. *Eliz.* c. 1. but all these are either repealed or expired: yet compassings or imaginations against the King by word, without an overt Act, is an High misprision.

Co. 3 Inst. f. 140.

Note, that there is a Law made for the Preservation of His now *Majestie's* Person and Government, against Treasonable and seditious practises (during his natural life, which God long continue) proceeding from Printing, Writing, Preaching, or malicious and advised speaking.

13. *Car.* II. Reg. c. 1.

Note further, that to calculate or seek to know by setting of a figure, or Witchcraft, how long the King shall Reign or live, is no Treason, for it is no compassing or the imagination of the death of the King, within the Stat. of 25. E. 3. And this appeareth by the Judgment of the Parliament in 23. *Eliz.* whereby this offence was made felony, during the life of Q. *Elizabeth*, which before was punishable by fine and imprisonment.

Co. 3. Inst. f. 6.

But *Scipio Gentilis* in his first Book *De conjuratione* sayes; *De vita Principis inquirere præsertim per Astrologos capitale esse: neque hoc solum, sed etiam de ea dubitare, vel desperare*

sperare pro crimine Majestatis habitum esse; si ea desperatio indiciis esset aliquibus patefacta.

Thus much of the *King* himself.

If any do compass or imagine the death of the Queen Consort, or Prince, (the Kings Son being Heir apparent to the Crown for the time being) and declare it by some overt Act; the very intent is Treason, as in case of the King himself. 25. E. 3. c. 2. *De proditionibus.*

If a man slay the *Chancellor*, *Treasurer*, or the Kings Justices of the one Bench, or the other, Justices in Eyre, or Justices of Assize, and all other Justices assigned to hear and determine, being in their places doing their Offices: And the reason wherefore it is Treason in these Cases is, because sitting judicially in their places (that is in the Kings Courts) and doing their Office in administration of Justice, they represent the Kings Person, who by his Oath is bound that the same be done. 25. E. 3. c. 2.

2. *Touching violation, or Carnal knowledge.*

To violate or to carnally know the Kings Companion, or the Kings eldest Daughter unmarried, or the Wife of the Kings eldest Son, and Heir apparent, is High treason. 25. E. 3. c. 2.

The reason that the eldest Daughter only is mentioned in Stat. of 25. E. 3. is for that for defaut of Issue Male, she only is inheritable to Crown.

3. Touching War.

25. E. 3. c. 2. To levy War againſt our Lord the King is High treaſon: This was ſo by the Common Law, for no Subject can levy War within the Realm without Authority from the King; for to him it only belongeth. *F. N. B.* 113. *Co. lib.* 2. *Wiſemans* Caſe *f.* 15. *b.* In the Codes of *Juſtinian* is extant the Conſtitution of *Valentinian* and *Valens*; *Nulli prorſus nobis inſciis, atque inconſultis quarumlibet Armorum movendorum copia tribuatur: Huc pertinet illud Auguſtius: Ordo naturalis mortalium paci accommodatus hoc peſcit, ut ſuſcipiendi Belli auctoritas, atque Conſilium penes Principes ſit.*

If any levy War to expulſe Strangers, to deliver men out of Priſon, to remove Counſellors, or againſt any Statute, or to any other end, pretending Reformation, this is levying of War againſt the King, becauſe they take upon them Royal Authority, which is againſt the King.

Co. 3. Inſt. *f.* 9.

So if any with Strength and Weapons, invaſive and defenſive doth hold and defend a Caſtle or Fort, againſt the King and his Power, this is levying of War againſt the King within the Statute of 25. E. 3.

Co. 3. Inſt. *f.* 10.

One *Thomas Benſted* was indicted and arraigned before ſpecial Commiſſioners of *Oyer* and *Terminer* in *Southwark*, wherein all the Juſtices and *Barons* were in Commiſſion, and preſent; at which time upon Conference with

Cro. 3. part. *Benſteds* Caſe. *f.* 583.

with all the Justices, it was resolved;

First, that going to *Lambeth House* in warlike manner, to surprize the Arch-Bishop, who was a Privy Counsellor, (it being with Drums, and a multitude, as the Indictment was, to the number of 300. persons) was Treason. And,

Secondly, It was resolved by ten of the said Justices *seriatim*, that the breaking of a Prison, wherein Traitors be in Durance, and causing them to escape, was Treason, although the Party did not know that there was any Traitors there, upon the Stat. of 1, *H.* 6. *c.* 5.

And so to break a Prison, whereby Felons escape, is felony, without knowing them to be imprisoned for such offence.

Note, A Compassing or Conspiracy to levy War, is no Treason; for there must be a levying of War *de facto*.

4. *Touching Adhesion to the Kings Enemies.*

If a man be adherent to the Kings Enemies in his Realm, giving to them aid and comfort in the Realm, or elsewhere, it is High treason. 25 E. 3. c. 2.

Having given you the words of the Stat. 25. *E.* 3. I propose these Queries:

Whether the delivery of a Castle or Fort to an Enemy be an Adhering to the Kings Enemy? Qu. 1.

To deliver or surrender the Kings Castles Resp.

or Fort by the Kings Captain thereof to the Kings Enemy within the Realm, or without for Reward, &c. is an Adhering to the Kings Enemy, and consequently Treason declared by the Act of 25. E. 3.

Qu. 1. Whether the Aiding or succouring of a Rebel beyond Sea be Treason?

Resp. A, is out of the Realm at the time of a rebellion within *England*, and one of the Rebels doth fly out of the Realm, whom A, knowing his treason, doth aid or succour, this is no Treason in A, by the Stat. of 25. E. 3. becaule the Traitor is no enemy.

Co. 3. Inst. f. 10. 13. Eliz. Dyer f. 298.

Qu. 2. *Utrum Exteri, qui cum Subditis contra Principem militant, Rebelles sint habendi?*

Resp. An Enemy coming in open hostility into *England*, and taken, shall be either executed by *Marshal* Law or ransomed; for he cannot be indicted of Treason, for that he was never within the Protection or Ligeance of the King, and the Indictment of Treason saith, *Contra Ligeantiam suam debitam.*

Dyer 4. Mar. f. 145. a. Co. Lib. 7. Calvins Calc.

But if a Subject joyn with a Foreign Enemy, and come into *England* with him, he shall not be taken prisoner here, and ransomed or proceeded with as an Enemy shall, but he shall be taken as a Traitor to the King.

13. Eliz. Dyer f. 298.

Whether an *English* Man born consulting with a Foreign Prince, to invade his Country, may be charged with High treason?

A Consultation was had concerning *John Story* Doctor of Law, the *Duke* of *Alva's* Searcher, whether he, being an *English* Man born, who in *Brabant* had consulted with a

Cambdens Eliz. f. 144 & 145. An. 1572.

Foreign

Forreign Prince about invading his Countrey, and had shewed the means of Invasion, might have been charged with High treason? The skilfullest Lawyer affirmed that he might.

Whereupon he was arraigned, and being to be charged with Treason, for that amongst other things, he had shewed to the *Duke* of *Alva*'s Secretary the means to invade *England*, raise *Ireland* into rebellion, and excite the *Scots* to break into *England*, all at once: He refused to submit himself to Tryal, and to the Laws of *England*, and affirmed that the Judges had no power over him, for that he was not a Subject sworn to the Queen of *England*, but to the King of *Spain*. But he was condemned according to the ordinary forme of *Nihil dicit*, and suffered the death of a Traitor; for that no Man can shake off his Country wherein he is born, nor abjure his native saile, or his Prince at his pleasure; *Nemo Patriam in qua natus est, exuere, nec Ligeantiæ debitum ejurare possit.* With this Law doth concurre the Civil Law: *Origine propria neminem posse voluntate sua eximere manifestum est.*

Co. Lit f. 129. a. 13. Eliz. Dyer 300. Doctor Story's Case. Co. lib. 7. Calvin's Case. Cod. 10. 38. 1. Crimen fals.

5. *Touching Fausonery.*

If a Man counterfeit the Kings Great or Privy Seale, or his Money, it is High treason.

25. E. 3. f. 2.

All antient Authors agree that this was High treason by the Common Law (as *Bracton*, *Britton*, *Fleta*, and the *Mirrour*.

The Forging of the Kings Coyn is High treason, without utterance of it; for by the

Act of 25. E. 3. the Counterfeiting is made High treaſon.

One *Morgan* and two others were indicted for Counterfeiting twenty Shilling Pieces of the Kings Coyn; and *Morgan* for uttering thoſe Pieces to the Kings Subjects, knowing them to be counterfeit; and being thereupon arraigned, he pleaded *Not guilty*. And evidence being pregnant againſt *Morgan*, he was found guilty, and the others were acquitted: And Judgment given that he ſhould be drawn and hang'd; but not to be quartered, according to the opinion of *Stamford f.* 182.

Cro. 3: part. *Morgans* Caſe 383.

Note, that by the Stat. of 5. *Eliz.* to clip, waſh, round, or file, for wicked lucre and gain is declared High treaſon. So by the Statute of 18. *Eliz.* 'tis enacted, that diminiſhing, ſcaling or lighting of the Kings Coyn within this Realm, is High treaſon.

5. *El. c.* 11.

18. *E. c.* 1.

Touching Money, the Civil Law ſpeaks thus:

Qui falſam monetam percuſſerint, ſi id totum formare noluerunt, ſuffragio juſtæ pœnitentiæ abſolvuntur. D. 48. 10. 19. *De falſa Moneta.*

Falſa moneta deprehenditur ex materia, pondere, & forma adulterina, Gothofredus.

Quicunque Nummos aureos partim raſerit, partim tinxerit, vel finxerit: ſi quidem liberi ſunt, ad beſtias dari: ſi ſervi, ſummo ſupplicio affici debent. D. 48. 10. 8.

6, and

6, and last: Bringing into the Realm Counterfeit Coyn.

If a Man bring false Money into this Realm counterfeit to the Money of *England*, knowing the Money to be false, to Merchandise or make payment, in deceit of our Soveraign Lord the King, and of his People, it is High treason.

But note, that the uttering of false Money in *England*, though the Person know it to be false and counterfeit to the Likeness of the Coyn of *England*, is no Treason within the Statute of 25. E. 3. unless he brought it from a Foreign Nation; for the words of the Statute are, Si Home apport faux Money en ceste Realm.

Having related the several parts or kinds of Treason, within the Statute of 25. E. 3. I shall add these few Queries touching High treason, and so conclude.

Whether a mad Man may be guilty of High treason. Qu. 1.

The antient Law was, that if a mad Man had killed, or offered to kill the King, it was holden for Treason; and so it appears by King *Alfreds* Law, before the Conquest, and in *Beverleys* Case; for the King is *Caput & Salus Reipublicæ, & a Capite bona valetudo transit in omnes*, and for this cause Kings Persons are so Sacred, that none may offer them violence, without being guilty of High treason; *Et pereat unus ne pereant omnes.* Resp. Co. *lib.* 4. *f.* 124. *b.* *Beverleys* Case.

But now by the Statute of 25. E. 3. and by force of the words, Fait compasser ou imaginer la mort; he that is *Non compos mentis*, and totally deprived of all compassings and imaginations, cannot commit High treason, by compassing or imagining the death of the King: for *furiosus solo furore punitur*; and *furor* in the Civil Law is *continuata mentis alienatio, qua quis omni intellectu caret.*

Co. 3. Inst. f. 6. Co. Lit. 247. b.

If a Man commit Treason, and confesseth the same, or be thereof otherwise convict, if afterwards he become *de non sanæ memoriæ*, he shall not be called to answer; or if after Judgment he become *de non sanæ memoriæ*, he shall not be executed; for it cannot be example to others.

Co. 3. Inst. f 4. Lib. 4. Beverleyes Case.

The Civil Law:

Culpam non admittit, qui suæ mentis non est.

D. 48 9. 9. 2.

Si per furorem aliquis parentem occiderit, impunitus erit, Divi Fratres rescripserunt super eo, qui per furorem matrem necaverat. Nam sufficere, furore ipso eum puniri?

Qu. 2. Whether an *Alien* residing here, can commit High treason?

Resp. Co. Litt. 192. a. Dyer 144. Co. lib. 7. Calvins Case. Co. 3. Inst. f 4 & 5.

All *Aliens* that are within the Realm of *England*, and whose Soveraign are in amity with the King of *England*, are within the protection of the King, and do owe a Local or Topical obedience to the King, are within the Act of 25. E. 3. and if they commit Treason against the King, they shall be punished as Traitours; and the Indictment shall say *contra Legeantiæ debitum.* Whe-

Whether the killing of a Foreign Ambassadour residing here, be High treason? Qu. 3.

Albeit the malicious killing of an Ambassabour be *justi-belli causâ*, and *contra jus Gentium*, yet the killing of him is no Treason, within the Stat. of 25. *E.* 3. until itl be so declared by Parliament, as it was in the Case of *Kerby* and *Algere*, who were attainted for the killing of *John Imperial*, Ambassadour from the State of *Genoa*, but that Declaration was taken away by the Statute of 1. *Mar.* Resp. Co. 3. Iust. f. 8.

Whether an Ambassadour, which raiseth Rebellion ahainst the Prince to whom he is sent, may enjoy the priviledge of an Ambassadour, and be not subject to punishment as an Enemy? Qu. 4.

Such an Ambassadour hath by the Law of Nations, and by the Civil Law of the *Romans*, forfeited all the Priviledges of an Ambassadour, and is subject to punishment. Resp.

If a Foreign Ambassadour, sayes *Coke*, committeth here in our Realm any crime, which is *contra jus Gentium*, as Treason, Felony, Adultery, or any other crime which is against the Law of Nations, he looseth the Priviledg and Dignity of an Ambassadour, as unworthy of so high a Place, and may be punished here as any other privete *Alien*, and not to be remanded to his Soveraign, but of courtesy. *Hill.* 14. *Eliz.* *The Bishop of* Rosles Case. Co. 4. Inst. f. 153. *Bulstrodes* Reports. 3d part. The *King* v. March.

But if any thing be *malum prohibitum*, by any Act of Parliament, Private Law or Custom of the Realm, which is not *malum in se jure Gentium*, nor *contra jus Gentium*, an Ambassadour

Embaſſadour reſiding here ſhall not be bound by any of them: but otherwiſe it is of the Subjects of either Kingdom, *&c.* And the reaſon why private *Aliens* are bound by our Acts of Parliament, Private Laws and Cuſtoms, is given by the learned *Grotius*, *viz.* *Quia ad gubernationem Populi moraliter neceſſarium eſt, ut qui ei vel ad tempus ſe admiſcent, quod fit intrando territorium, ij conformes reddant ejus Populi inſtitutis.*

Lib. 2. c. 2. nu. 5. De jure belli ac Pacis.

Qu. 5. Whether a Foreign Prince, by his dwelling and reſiding here, can commit Treaſon?

Reſp. When a Foreign Prince comes with leave into *England*, he ſubjects himſelf under the Protection of the King of *England*, and as by well doing he enjoyes the benefit of the Laws, ſo by ill doing he is ſubject to the Equity thereof, according to that ſaying of the Lawers, He deſerveth not the benefit of the Law, which offendeth againſt the Law. Otherwiſe better were the condition of a Foreign Prince offending in another Princes Kingdom, than his that reigneth well: He is thought alſo to be a Subject, though not originary yet temporary, becauſe two abſolute Princes in reſpect of Royal Authority, cannot be in one Kingdom at once; and therefore it is a received opinion of the learned in the Laws, A King without his own Dominions (except it be in an Expedition of War) is but a private Man; and conſequently can neither confer, nor exerciſe Royalties.

Moreover it is ſaid, that ſuch a Prince by his offence looſeth *merum Imperium*, his meer

and

and absolute Soveraignty, and that such are subject by their dwelling only and place of abode, might commit Treason, and that a Prince hath power or Jurisdict. over another Prince that is his equal as often as any hath subjected himself under the Judgment of his Equal either by express words or Covert, Contract, or by offending within the Jurisdiction of his Equal.

Vide Cambdens Eliz. in 29. year of her Reign, touching the Queen of *Scots*.

2. *Misprision of Treason.*

Touching Misprision, 4 things are to be principally observed; The Etymology of the word, its Description, its Division, and the Punishment therefore.

1. The Etymology or Origination of the word:

Misprision, cometh of the *French* word *Mespris*, which properly signifieth neglect or contempt; for (*mes*) in Composition in the *French* signifieth *mal*, as *mis* doth in the *English* Tongue: as mischance, for an ill chance, and so *Misprise* is ill apprehended or known. Co. 3. Inst. f. 36.

2. Its Description:

In legal understanding Misprision of treason, is either when one knoweth, that another hath committed treason, and will not discover him to the King or to the Council, or to any Magistrate, but doth conceal the same; it is when one hath committed some hainous offence under the degree of treason.

3. Its Division: Mispri-

Miſpriſion of treaſon is twofold: 1. Paſſive, called *Crimen omiſſionis*, as in concealment, or not diſcovery of treaſon: And therefore by the Statute of 5. & E. 6. concealment or keeping ſecret of any High treaſon, is declared only Miſpriſion of Treaſon.

13. El. c. 2. As for example: It is Miſpriſion of High treaſon in concealing of a Bull from the *Pope* of *Rome*.

Dyer f. 296 Coyners Caſe. So the receiving of one that hath counterfeited the Kings Coyn, and comforting of him, knowing him to have counterfeited the King Coyn, is but a Miſpriſion.

But by the Common Law, concealment of High treaſon, was Treaſon, as appeareth in the Caſe of the Lord *Scrope* anno 3. *H.* 5, and by *Bracton lib.* 3. *f.* 118. *b*, & 119. *a*.

And with our Common Law, the words of *Iſocrates* to *Nicocles* are agreable; *viz. Eadem pœna digni ſunt ſupprimentes hujuſmodi facinus, quæ facinoroſi.*

2. Active, called *Crimen commiſſionis*, as in committing ſome heinous offence, under the degree of Treaſon; as when one fixes an old

37. H. 8. Br. Tit. Treaſon. Seale of a Patent to a new Patent of Non-Reſidence, this is holden to be a Miſpriſion of Treaſon only, for it is an abuſe of the great Seale, and not counterfeiting of it.

So if a man know Money to be counterfeit, and bring the ſame out of *Ireland* hither into *England*, and utter it in payment, this is but

Co. 3. Inſt. f. 140. a Miſpriſion, and no Treaſon.

So the compaſſings or imaginations againſt the King by word, without an overt Act, is a High Miſpriſion.

4. The

4. The punishment of this offence.

In all Cases of Misprision of Treason, the party offendour shall forfeit his Goods and Dutie for ever, and the profits of his Lands for terme of his life, and to be imprisoned during life.

From which punishment if any will save himself, that knoweth of any High treason, he ought with as much speed as conveniently he may, to reveal the same to the King, or some of his Privy Councel, or any other Magistrate.

Note, that in every Treason or felony, is included Misprision, and where any hath committed Treason or felony, the King may cause the same to be indicted, and arraigned, but of Misprision only, if he will.

3. *Robbing the Kings Treasure.* *Crimen peculatus.*

The Robbing the King of his Treasure, or Money, is accounted *Damnum inæstimabile*, for the Kings Treasure is the sinew of War, and the honour and safety of the King in time of Peace. Co. 3. Inst. f. 112. Co. litt. 90. b. 131. b.

The Civil Law doth accord with our Law in this point. *Pecunia nervus Reipublicæ, seu belli. Cur ita? Imperium sine vectigalibus nullo modo esse potest.* Cicero. *Militares expensæ, & Hostium Incursiones multa regent diligentia, & non possunt citra pecuniam hæc agi.* N. 8. 2. 10. 2.

Fourscore and one persons, (whereof the Abbot of *Westminster* and 48 of his Monks were part) brake into the Receipt, and feloniously Co. 4. Inst. f. 112.

niously robbed the King of a hundred thousand pounds: All these fourscore and one were indicted of this felony, and committed to the *Tower* of *London*, *&c.* and this was the occasion of the new building of both parts of the *Exchequer*, which were before of antient building, and weak.

The punishment of this crime in the Civil Law, is this:

Peculatus pœna aquæ & ignis interdictionem, in quam hodie successit deportatio, continet. Porro qui in eum statum deducitur, sicut omnia pristina jura, ita & bona amittit.

4. *Bribery.*

Crimen Repetundarum.

Bribery (sayes *Coke*) is a great Misprision, when any man in Judicial place takes any Fee or Pension, Robe or Livery, Gift, Reward, or Brocage of any person that hath to do before him any way, for doing his Office, or by colour of his Office, but of the King only, unless it be of meat, and drink, and that of small value, upon divers and grevious punishments.

Having given you a description of Bribery, I propose these Queries with Resolutions upon them; and then shew what the Civil Law saith touching Bribery, and Reward.

Quæst. Whether Bribery can be committed, although there be no suit depending *in foro contentioso?*

Resp. Bribery may be committed not only when a Suit dependeth *in foro contentioso*, but also when

when any in Judicial place doth any thing, *virtute* or *colore Officii*, though there be no Suit at all.

For example, if the Lord Treasurer for any gift or brocage, shall make any Customer, Controller, or any Officer, or Minister of the King, this is Bribery, for he ought to take nothing in that Case, by the Statutes of 12. *R.* 2. *c.* 2. 5. *E.* 6. 5. 6. *Co. Litt. f.* 234. *a. Co.* 3. *Inst. f.* 154. *Hobarts Reports*, *Roy v.* Bishop of *Norwich f.* 75. but that he make all such Officers, and Ministers of the best and most lawfull Men, and sufficient for their estimation and knowledg. These Laws aforementioned, made *contra crimen Ambitus* are worthy to be known by all; but more worthy to be put in execution, for they prevent Bribery and extortion; They that buy, will sell.

Co. 3. Inst. *f.* 148.

Laws made *contra Ambitus.*

Whether this offence of Bribery can be perpetrated, by one that hath a Judicial place in the Ecclesiastical Court?

Qu. 2.

The Statute of 5 *E.* 6. *c.* 16. doth extend as well to Ecclesiastical Office as temporal, which concern the Administration and execution of Justice, and therefore any Chief Judicial Officer Ecclesiastical, taking any thing *virtute* or *colore Officii*, for any Office Ministerial or Judicial, is guilty of Bribery.

Resp.

Co 3. Inst. 148. Cro. 2. part. *Trevors* Case. *f.* 269.

Touching Gifts and Bribery, take notice what the Civil Law sayes:

Non in totum Xeniis abstinere debebit Proconsul, sed modum adjicere, ut neque morose in totum abstineat, neque avare modum Xeniorum

1. *De Xeniis.*

rum excedat, quam rem Divus Severus, & Imperator Antonius elegantissime epistola sunt moderati, cujus epistolæ verba hæc sunt: Quantum ad Xenia pertinet, Audi quid sentimus. Vetus proverbium est, neque omnia, neque quovis tempore, neque ab omnibus. Nam valde inhumanum est, a nemine accipere; sed passim vilissimum est, & omnia avarissimum.

D. 4. 16. 6. 3.

Imo non est inhumanum. Nam & munera excæcant oculos sapientum, ac pervertunt verba Justorum: verum hic agitur (saies Gothofredus) de muneribus quæ dantur Proconsuli, ut hospiti, non ut Judici.

Et hic aperte Xenia: & ut appellat quoque hic Jurisconsultus, Xeniola, distinguuntur a dono & munere, seu munerum qualitate: Aliud ii est munus, aliud Xenion & Xeniolon.

2. De Repetundis. D. 48. 11. 3.

Lege Julia repetundarum tenetur, qui cum aliquam potestatem haberet, pecuniam ob judicandum, decernendumque acceperit.

D. 48. 11. 9.

Qui munus publice mandatum, acceptâ pecunia, rumperunt, crimine repetundarum postulantur.

5. Extortion.

Extortion is a Misprision by wresting, or unlawfully taking by any Officer by Colour of his Office, any money or valuable thing of or from any Man, either that is not due, or more then is, or before it be due, Quod non est debitum, vel quod est ultra debitum, vel ante tempus, quod est debitum.

Co. Litt. 368. b.

Of this crime it is said, that in no other then

than Robbery; and another saith, that it is more odious than Robbery; for Robbery is apparent, and hath a face of a crime, but extortion puts on the vizor of vertue, for expedition of Justice and the like; and it is ever accompany'd with that grevious sin of perjury; we call it in Latin *Crimen expilationis, seu concussionis.* Co. Lit. 368. b.

But the *Quære* may be whether Extortion and Exaction are all one? It is answered, They are not; for there is this difference taken between Exaction and Extortion: Extortion is where an Officer demandeth and wresteth a greater summe or reward, than his just Fee: And Exaction is where an Officer or other Man demandeth and wresteth a Fee or reward, where no Fee or reward is due at all.

6. *Striking in the Kings Courts, where he resides personally, or by Representation.*

If any Man in *Westminster* Hall, or in any other Place, sitting the Courts of *Chancery*, the Kings Bench, the Common Bench, the Exchequer, or before Justices of Assize, or Justices of *Oyer*, & Terminer, shall draw a weapon upon a Judge, or Justice, though he strike not, this is a great Misprision, for the which he shall loss his right hand, and forfeit his Lands and goods, and his Body to perpetual imprisonment; The reason is because it tendeth *ad impedimentum Legis terræ.* So it is if in *Westminster* Hall, or any Co. 3. Inst. f. 140. 22. E. 3. 13.

other Place, ſitting the ſaid Courts there, or before Juſtices of Aſſize, or *Oyer* and Terminer, and within the view of the ſame, a Man doth ſtrike a Jury, or any other with weapon, hand, ſhoulder, elbow, or foot, he ſhall have the like puniſhment; but in that caſe, if he make an aſſault, and ſtrike not, the offender ſhall not have the like puniſhment.

3. *Eliz.* *Dyer* 188.

One *Peter Cary* was indicted for drawing his ſword *in Aula Weſtm. ſedentibus Curiis*, and in diſturbing the Sheriff, in making an Arreſt upon one T. by force of a Bill of *Middleſex*: and being arraigned and found guilty, had Judgment of perpetual Impriſonment, and to pay one hundred pounds to the Queen: And note, that upon the evidence it appeared to be upon the ſtairs, aſcending the Court of Wards, and ſo out of the view of the Courts: But *Popham* ſaid, although it were out of the view of the Courts, yet if the Indictment had been as it ought to have been: *viz. coram Domina Regina*; the Judgment ſhould have been, that his right hand ſhould have been cut off, and that he ſhould forfeit all his Lands and Chattels, and have perpetual Impriſonment.

Cro. 1. part. *Cary's* Caſe 405.

Sr *William Waller* was indicted, for that he in the Palace of *Weſtminſter* neer the Great Hall, the Juſtices in the Kings Bench, Chancery, and Common Bench, judicially ſitting to hear Cauſes, made an aſſault, and affray upon Sr *Thomas Reignolds*, and beat him, in diſturbance of the Law, and contempt of the King,

Cro. 3. part. Sr. *William Wallers* Caſe f. 373 & 374.

King, &c. and upon this being arraigned, and found guilty, becauſe the Indictment was not, that he did it in preſence of the Juſtices, nor in the preſence of the King, all the Judges agreed that the Judgment of cutting off his hand ſhould not be given; and ſo *ſeriatim* they delivered their opinions: But becauſe this offence was in the Palace, neer the Hall door, whereby tumults might have been made, and becauſe it was found ſitting all the Courts, and in diſturbance of Juſtice and Law, and in contempt of the King, the Court awarded, that he ſhould be impriſoned for the ſaid offence during the Kings pleaſure, and ſhould pay 1000 pounds fine.

Thus much where the King is preſent by Repreſentation.

If any ſtrikes in the Kings Palace, where the Kings Royal Perſon reſideth, he ſhall not loſe his right hand, unleſs he draw blood; but if he draw blood, then his right hand ſhall be ſtrucken off, he perpetually impriſoned, and fined, and ranſomed. 33. H. 8. c. 12.

By what hath been ſaid, a Man may perceive a great differenee between a blow, or ſtroke in, or before the ſaid Courts of Juſtice, where the King is repreſentatively preſent, and the Kings Courts, where his Royal Perſon reſideth; for in the Kings Houſe, blood muſt be drawn, which needeth not in, or before the Courts of Juſtice, when the Judges are doing of that which to Juſtice appertaineth; and the reaſon is, *Quia Juſtitia firmatur Solium.*

7. *Routs.*

A Rout is when People do aſſemble themſelves together, and after do proceed or rid, or go forth, or do move by the inſtigation of one or more, who is their Leader: This is called a Rout, becauſe they do move and proceed in Routs and members.

Alſo where many aſſemble themſelves together upon their own common Quarrel, and brawles, as if the Inhabitants of a Town will gather themſelves together, to break hedges, pales, or ſuch like, to have Common there, or to beat another, that hath done to them a common diſpleaſure, or ſuch like, that is a Rout, and againſt the Law, although they have not done, or put in execution their miſchievous intent, if ſo be they do go, ride, or move forward after their firſt meeting.

Co. 3. Inſt. 176. *Lamb.* lib. 2. c. 5.

Note, that there is diverſity between committing of a great Rout, or the like, and Levying of War, for example, as if three or four, or more do riſe to burn or put down an Incloſure in Dale, which the Lord of the Mannour of Dale hath made there in that particular place, this or the like is a Rout, a Riot, or an unlawfull Aſſembly, and no Treaſon,

Co. 3 Inſt. f. 9 & 10.

But if they have riſen of purpoſe to alter Religion eſtabliſhed within the Realm, or Laws, or to go from Town to Town generally, and to caſt down Encloſures, this is

is a Levying of War (though there be no great number of Conspiratours) within the perview of the Statute of 25. E. 3. c. 2. because the Pretence is publique and general, and not private in particular. As it was resolved, *Pasch.* 39. *Eliz.* by all the Judges of *England*, in the case of *Richard Bradshaw* Miller, *Robert Burton*, ——— Mason, and others of *Oxfordshire*.

8. *Riot.*

Riot (in Latine *Riotum*) cometh of the *French* word **Rioter**, *id est*, *Rixari*; and in the Common Law signifieth when three or more do an unlawful Act, as to beat any Man, or to hunt in his Park, chase or warren, or to enter or to take possession of another Mans Land, or to cut or destroy his corn, grasse or other profit, *&c.* Co. 3. Inst. f. 176.

By the Statute of 17. *R.* 2. and 13. *H* 4. the Justices of Peace, and Sheriff are to arrest those that commit Riot, and to record that which they find done in their presence against the Law. 17. *R.* 2. c. 8. 13. *H.* 4. c. 7.

Each Man that is able, ought to help to repress Riots, upon pain of Imprisonment, and to make fine to the King. 2. *H.* 5. 8.

Evans, and *Cottington* and 7. others, were indicted for a Grand Riot, that they with others there named, to the number of 1000. persons, made a Rescous, and assault upon *Henry Smith* a Baylif, who by virtue of a Warrant upon a Bill of *Middlesex*, against

William Cleer, had arreſted him, aud was carrying him to Priſon, and they procured him to eſcape. The Arreſt was at *Charing Croſs* in the Pariſh of St. *Martins*; aad after the Arreſt, they aſſaulted the Bayliffes, and beat them; and the Bayliffes putting the Priſoner into an houſe for ſafe keeping againſt the tumult, they aſſaulted the houſe; and notwithſtanding a Juſtice of Peace, aſſiſted with three Conſtables, made proclamation for keeping the Peace, and for their departure, yet they continued their aſſault, breaking open the houſe, and with ladders taken from th: Kings Houſe of *White-Hall*, (where the King with His Court was reſident) upon the 24. of *March* 13. Car. in the afternoon of the ſaid day, made this Riot and Reſcous, and carryed the Priſoner away through the Kings Houſe, and cauſed him to eſcape. Upon this Indictment 9. of them being arreſted, pleaded Not-guilty, and 4. of them *viz. Evans*, *Cottington*, *Groom* and *Heatly* being arraigned, were found guilty, and 5. of them were found Not-guilty, but againſt three of them was probable evidence, that they were aiding to this Riot and Reſcous, but the Jury acquitted them; wherefore becauſe it was ſo great a Riot, and offence, being committed ſo neer the Court, it was adjudged, that the ſaid four perſons, which were ſo convicted, ſhould be committed to Priſon, and every one of them ſhould pay 500. pounds fine to the King: And that every of them ſhould ſtand on the Pillory at *Weſtminſter*, and *Charing Croſs*

Croſs, where the Riot was done; and that *Thomas Groom*, who was a Cobler, and entered into the houſe with a drawn ſword, and a kettle upon his head, as an helmet to defend himſelf, ſhould ſtand on the Pillory with a ſword in his hand, and a kettle upon his head, and ſhould be bound with good ſecuties for their good behaviour, before they ſhould be delivered: And the three which were acquitted, againſt whom there was ſuch probable evidence, were bound to find ſecurities for their good behaviour.

Note, An unlawful Aſſembly is when three or more aſſemble themſelves together, to commit a Riot or Rout, and do it not. Co. 3. Inſt. f. 176.

One or more, ſayes the Lord *Coke*, may commit a force; three or more may commit an unlawful Aſſembly, a Riot, or a Rout: A multitude (as *Some* have ſaid) muſt be ten, or more. *Multitudinem decem faciunt.* And ſo (ſaid they.) it is ſaid, *de grege hominum.* But *Coke* tells us, that he could never read it reſtrained by the Common Law to any certain number, but left to the diſcretion of the Judges. Co. Litt. 257. a. Co. 3. Inſt. f. 176.

In the Civil Law thus: *Decem homines populum, tres Collegium, duo Congregationem, & quindecim turbam conſtituunt in Jure Civili, ſed Jure in Communi Angliæ tres turbam faciunt.* Bartolus.

9. *Affraies, Single Combats, and Challenges, &c*

1. Single combat.

Single Combats, or Duels between any of the Kings Subjects of their own heads, and for private malice or displeasure, is prohibited by the Laws of this Realm; for in setled State governed by Law, no Man for any injury whatsoever ought to use private revenge; because it belongeth to the King, who is the Supream Magistrate, and Gods Lieutenant on Earth. And the Law herein is grounded upon the Law of God; *Deut.* 32. 35. *Rom.* 12. 19. It is also against the Law of nature, and Nations; for a Man to be Judge in his own proper Cause, especially in Duels, where fury, wrath, malice, and revenge are the rules of the Judgment.

Hinc est, sayes one, *quod Legum reperta est sa ra reverentia, ut nihil manu, nihil proprio ageretur impulsu. Quid enim a bellica confusione pax tranquilla distat, si per vim litigia terminantur?*

Object. But it may be objected, that it is lawful *vim vi repellere*, therefore private revenge is lawful: The reason of the consequence is because by revenge force by force is repelled.

Resp. It is answered, That the antecedent is not simply and universally true: *Vim vi repellere licet cum moderamine inculpatæ tutelæ, in casu ultimæ, & indeclinabilis necessitatis, non semper & quocumque modo.*

Note, that Duels are lawful, if they are warranted

warranted by publick Authority, ſuch as heretofore our Tryals by batail, *ad probandam veritatem litis*; and ſuch was the Duell betwixt *David* & *Goliah*, which was ſtrucken by publick warrant and authority.

Vid. more of this in *Grotius lib.* 2. *c.* 1. *nu.* 15. & *cap.* 23. *nu.* 10.

Note further, that albeit upon the Single Combat (that proceeds not from publick authority) no death enſue, nor blood drawn, yet the very Combat for revenge is an Affray, and a great breach of the Kings Peace, an Affright and terrour to the Kings Subjects, and is to be puniſhed by fine aud Impriſonment, and to find ſureties for their behaviour. Affray.

When any Affray is made by Single Combat, any ſtander by, that is no Officer, may endeavour to part them, and prevent further danger, and the Law doth encourage them thereunto, for if they receive any harme by the Affrayours, they ſhall have their remedy by Law againſt them; and if the Affrayours receive any hurt by the endeavouring only to part them, the ſtanders by may juſtify the ſame, and the Affrayours have no remedy by Law. But if either of the Parties be ſlain or wounded, or ſo ſtriken as he falls down for dead, in that caſe the ſtanders by ought to apprehend the Party ſo ſlaving, *&c.* or to endeavour the ſame by the Hue and Cry, or elſe for his eſcape they ſhall be fined, and Impriſoned. But if the Sheriff, Juſtice of Peace, Conſtable, or other Conſervatour of the Peace Co. 3. Inſt. f. 178. 8. E. 2. Cor. 295. 22. Aſſ. Pl. 56.

do

do not part the Affrayours, for the preſervation of the Kings Peace, and apprehend them being within his view, or do not his uttermoſt to part, and apprehend them, they may be impriſoned for their neglect thereof, for they may command others to aſſiſt them, and therefore the rule holdeth in them; *qui non prohibet, cum prohibere poſſit, in culpa eſt.* And if any be commanded to aſſiſt them therein, and refuſe or neglect the ſame, it is a contempt in them, to be puniſhed by fine and Impriſonment.

3. H. 7. 10. 6. *Beding-ſtields* caſe.

The words Affray and Aſſault be indifferently uſed of moſt Men, and that alſo in ſome of our Book Caſes; but yet (according to *Lambards* opinion) there wanteth not a juſt difference between them: For Affray is derived of the *French* (Effrayer) which ſignifieth to terrify or bring fear, which the Law underſtandeth to be a common wrong, and therefore is it enquirable in the Turn of the Sheriff, or in a Leete 4. *H.* 6. 10, and 8. *E.* 4. 5. otherwiſe it is of an Aſſault, as it ſeemeth by thoſe very Books: yet may an Affray be without word, or blow given; as if a Man ſhall ſhew himſelf furniſhed with armes, or weapon, which is not uſually worn and born, it will ſtrike a fear into others that be not armed as he is: But an Aſſault, as it is fetched from another fountain, namely from the Latine *Aſſultus*, which denoteth a leaping (or flying) upon a Man: ſo can it not be performed without the offer of ſome hurtful blow, or at the leaſt of ſome fearful ſpeech.

And

And therefore to ſtrike at a Man (although he were neither hurt or hit, with the blow) was adjudged an Aſſault 22. *Aſſ. Pl.* 60. For this Aſſault doth always neceſſarily imply a hitting; and therefore in Treſpaſs of Aſſault and Battery, a Man may be found guilty of the Aſſault, and yet be excuſed of the Battery. 40. E. 3. 40, & 45. E. 3. 24.

3 *Challenges.*

Co. 3. Inſt. *f.* 158. v. *Hobarts* Reports. *Barrow.* v. *Llewillen f.* 62. *Hickes* caſe 215.

If any Subject by word, Meſſage, or Writing challenge another to fight with him, this is an offence before any combat be performed, and puniſhable by Law, and it is *contra Pacem, Coronam, & Dignitatem Regis.* For, *prohibetur cum aliquid, prohibentur etiam media ad illud tendentia.*

The means of ſuch evills as well as the end are to be prevented.

10. *Libells.*

A Libel ſignifieth a criminous report of any Man caſt abroad, be he Magiſtrate, or a private Perſon, or otherwiſe, unlawfully publiſhed in writing, and therefore for diſtinction ſake it is called an Infamous Libel, or Paſquil.

It matters not whether the Libel be true or falſe, or whether the Party be of good fame or ill fame; for it inciteth all the ſame Family, Kindred, or Society to revenge, and ſo tendeth by conſequence to the effuſion of blood, and to the breach of the publick Peace, and therefore ſuch Libelling, be it true or falſe, is puniſhable by our Law.

It

It was resolved in the *Star-Chamber* 44. *Eliz. Hallywoods* Case, that if any find a Libel, and would preserve himself out of danger, if it be a private Man, the finder may either burn it, or presently deliver it to some Magistrate; but if it concern a Magistrate, or Publick Person, he ought to give it to the Magistrate.

Cro. 3. part. *Jeffes* case f. 175.

One *Jeffes* was indicted for that he exhibited an infamous Libel, directed unto the King, against Sr *Ed. Coke*, late Chief-Justice of the Kings Bench, and against the said Court, for a Judgment given in the said Court, in the Case of *Magdalen Colledge*, affirming the said Judgment to be Treason, and calling him therein Traitour, perjured Judge, and scandalizing all the Professours of the Common Law, and containing much other scandalous matter: and fixed this Libel upon the great Gate at the entrance of *West. minster* Hall, and in divers other publick Places: And being upon this arraigned, prayed that Councel might be assigned, which was granted, and he had them, but would not be ruled to plead as they advised; but put in a scandalous plea, and insisting upon it, affirmed that he would not plead otherwise, whereupon it was adjudged, He should be committed to the *Marshall*, and that he should stand upon the Pillory at *Westminster*, and *Cheapside* with a Paper mentioning the offence; and with such Paper be brought to all the Courts at *Westminster*, and be continued in Prison until he made his submission in every Court;

Court; and that he ſhould be bound with ſureties to be of good behaviour during his life, and ſhould pay a thouſand pounds fine.

Adam de Ravenſworth was indicted in the Kings Bench for the making a Libel in writing, in the *French* Tongue, againſt *Richard of Snowſhal*, calling him therein *Roy de Raveners*, *&c.* wheupon he being arraigned, pleaded thereunto Not-guilty, and was found guilty. *Mich.* 10. *E.* 3. *Coram Rege Rot.* 92, *Ebor.*

So by what has been ſaid, a Libeller or publiſher of a Libel, committeth a publick offence, and may be indicted therefore.

The words of the Civil Law touching Libellers are theſe:

Injuria committitur; ſi quis ad infamiam alicujus Libellum, aut Carmen, aut Hiſtoriam ſcripſerit, compoſuerit, ediderit, dolove malo fecerit, quo quid eorum fieret. Juſt. 4. 4. 1.

Si quis famoſum Libellum ſive domi, ſive in publico, vel quocumque loco ignarus repererit: aut corrumpat priuſquam alter inveniat, aut nulli confiteatur, inventum. Si vero non ſtatim eaſdem Chartulas, vel corruperit, vel igni conſumpſerit, ſed vim earum manifeſtaverit: ſciat ſe quaſi authorem hujuſmodi delicti capitali ſententiæ ſubjugandum. Cod. 9. 36. *De famoſis Libellis.*

11, and

11, *and last, False Rumours; and slanderous news.*

None shal report slanderous news whereby discord may arise between the King and his
3. El. c. 34. People, or Great Men of the Realm: And he that doth so shall be taken and kept in Prison, until he hath brought him into the Court, which was the first authors of the tale.

2. R. 2. c. 5. The penalty is the same for telling slanderous lies of the Great Men of the Realm.

12. R. 2. c. 12. But by the 12. R. 2. it is enacted, that when any such is taken and imprisoned, and cannot find him, by whom the Speech be moved, that he be punished by the advice of the Councel, notwithstanding the said Statutes.

Inter Leges Alvaredi c. 28. Note, the Law before the Conquest was, That the Author and Spreader of false Rumours amongst the People, had his tongue cut out, if he redeemed it not by the estimation of his head.

To conclude: It may easily and manifestly appear to all such as have been conversant in our Chronicles, how pernicious and dange- to this our Kingdom, unlawful Assemblies and false Rumours have been in all precedent Ages; yea, such as at the first were very small, and inconsiderable, and began upon very small occasions, yet not being represſed in time grew to such greatness and height, that they afterward put in hazard the State and Government of this Land: And therefore it is behoveful and good wisdom for all Magistrates,

giſtrates, and Juſtices of Peace to endavour by all good means to quench the beginnings and firſt ſparks of ſuch offences, as knowing that for want of timely reſtraint, they may ſoon grow to like danger again. And the axiome in our Law is:

Intereſt Reipublicæ, ut pax in Regno conſervetur, quæcumque paci adverſentur provide declinentur: i. e,

It it moſt neceſſary in a Common-wealth to provide, that tranquility and peace be continued in the Realm, and that all things being contrary thereunto, may by foreſight be eſchewed.

Thus much of the firſt Part of my *Treatiſe*, I proceed to the Second.

Judicium

Judicium Criminis, OR THE JUDGMENT OF ENGAND; Touching PLEAS OF THE CROWN.

CONCERNING Judgments Criminal; I shall present these particulars, worthy of the Candid Readers observation: 1. The Definition of punishment. 2. The end of punishment. 3. The Division or several kinds of punishment found in our Authours. 4 The rules to be observed by our Judges for the inflicting of pains or punishments. 5. The circumstances to be weighed in relation to punishments. 6. The persons to be considered in Criminal Judgments. 7. The matters of Judgements Criminal. 8. The Judicial Acts, according to our Law.

Of these in their order.

1. *Of the Definition of punishment.*

Punishment in general signification is; *Malum passionis quod infligitur ob malum actionis*; but particularly it is defined by Mr *Horn* thus: Payne est a satisfaction de Trespasse, ou de peche. *Mirror c.4 sect. 12.*

2. *Of the end of punishment.*

The principal end of punishment in our Law is, that others by example may fear to offend, *Ut pœna unius sit metus multorum*; and therefore a Man that is *non compos mentis*, or an Infant that is within the age of discretion, is not (un Home) within the statute of 25. E. 3. c. 2. *de proditionibus*; for the end of punishment is that others may be deterred from the perpetration of similar offences. But such punishment can be no example to mad Men, or Infants, that are not of the age of discretion.

Co. 3. Inst. f. 4. 6. 108. Co. Lib. 4. Beverleys Case 124. a b 3. H. 7. 1. b.

Touching the end of punishment, I shall offer the saying of *Quintilian* and *Seneca*.

Quintilian hath these words: *Omnis pœna non tam ad delictum pertinet, quam ad exemplum.*

Seneca thus: *In vindicandis injuriis hæc tria Lex sequuta est, quæ Princeps quoque sequi debet; ut aut eum quem punit emendet, aut ut pœna ejus cæteros meliores reddat, aut ut sublatis malis securiores cæteri vivant.*

De C. C. l. 1. c. 21.

3. *Of the Divisions or several modes of punishment.*

The kinds or modes of pain, whereby delinquents are afflicted are these, saith *Bracton*: *Sunt quædam quæ adimunt vitam, vel membra: sunt quæ auferunt Civitatem, Burgum, vel Provinciam. Sunt quæ continent exilium, perpe-*

Lib. 3. c. 6. Tract. 1. de Actionibus.

perpetuum vel ad tempus, vel coercitionem ſſ. Impriſonamentum, vel ad tempus, vel ad perpetuum. Sunt quæ fuſtigationem, verberationem, pœnam Pilloralem, & Tymboralem, & damnum cum infamia inducunt: ſunt etiam quædam quæ dignitatis & ordinis inducunt depoſitionem vel alicujus actus privationem, vel prohibitionem.

The Diviſion of *Fleta* is thus:

Perſonalium injuriarum, quædam ſunt criminales, & quædam Civiles: Criminalium quædam ſententialiter mortem inducunt, quædam vero minime. *Lib. 1. c. 16.*

Horne thus: Of pains violent there be two ſorts, Corporal and Pecuniary: of Corporal ſome be Mortal, and ſome be Venial. *Mirror c. 4. ſect. 12.*

Having given the Reader the ſeveral puniſhments in our Law, it will not be amiſs to ſhew briefly the ſeveral ſorts of inflictions uſed amongſt the *Jews* and *Romans*.

1. Amongſt the *Jews*: Their puniſhments were either Capital, or not Capital: Their Capital contained four ſorts of Death. 1. Lapidation or Stoning. 2. Combuſtion or burning. 3. Decollation or Beheading. 4. Suffocation or Strangling. *Goodwins Civil, &c. Eccleſiaſt. Rites uſed by the Jews lib. 5. c. 7 & 8.*

The manner of burning was twofold; ſome they burnt with wood and fagots, this was termed by them, the Burning of the Body: Others they burnt by pouring in ſcalding hot lead, in at their mouthes, which deſcending into their bowels, killed them, the bulk of their Body remaining whole; and this was termed therefore, the burning of the Soul.

The leſſer puniſhments not Capital, were chiefly four: 1. Impriſonement: 2. Reſtitution: 3. *Talio* or Retaliation: 4. Scourging.

2. Amongſt the *Romans*:

Puniſhments publickly inflicted on Malefactors were either Pecuniary mulcts or Corporal puniſhments: The Pecuniary mulcts were two ſorts, either an appointed ſum of money was required of the party guilty, and then it was called *Mulcta*; or his whole State was ſeiſed on, and then it was termed a Confiſcation of his Goods.

Godwins Roman Antiq lib 3. ſect. 3. c. 1 & 2.

The Mulct was twofold, the one termed *Mulcta Suprema*, the other *Mulcta minima*.

Again; The Corporal puniſhments were either ſuch as were Capital, depriving a Man of his life: or Caſtigatory, ſuch corrections as ſerving for the humbling and reforming of the Offender, or for the deſtroying of him.

Thoſe puniſhments that deprived of life in ordinary uſe, and of which there is moſt frequent mention in *Roman* Authors, are theſe which follow; *Furca*, *Crux*, *Carcer*, *Culeus*, *Equuleus*, *de Rupe Tarpeia Dejectio*, *Scalæ*, *Gemoniæ*, *Tunica*, *Damnatio in gladium*, *in Ludum*, *ad beſtias*.

Note, That Capital puniſhments were ſometime taken in a Civil acception for the loſs of freedom, which the *Romans* called *Capitis deminutionem*, diſfranchizing; becauſe in every Free-Man thus diſfranchiſed, one head of the Corporation was as it were cut off: and ſometime (as is ſaid before) it is taken

taken for the loss of ones life; and this they called *Ultimum supplicium*.

Thus much of the kinds of punishments used amongst the *English*, *Jews* and *Romans*.

4. *Of the Rules for inflicting punishments.*

The Rules that concern the Infliction of punishments, are these following.

Respiciendum est Judicanti, ne quid aut durius, aut remissius constituatur, quam causa deposcit, nec enim aut severitatis, aut clementiæ gloria affectanda est: sed propenso Judicio, prout quæque res postulat, statuendum: In levioribus Brast. lib. 3. c. 16. de Actionib. *causis, leviores esse debent, ad lenitatem. In gravioribus autem pœnis, severitatem Legum cum aliquo temperamento benignitatis subsequi, Et pœnæ potius molliendæ sunt quam exasperandæ.*

2. *Pœna gravior ultra Legem posita, æstimationem conservat.* Or; Co. 3. Inst. f. 219.

Majore pœna affectus, quam Legibus statutum est, non est infamis.

With this Rule in our Law, the Civil Law Text doth concur;

Pœna gravior ultra Legem imposita existimationem conservat: ut & constitutum est, & responsum: ut puta si eum, qui parte bonorum multari debuit, Præses relegaverit: dicendum erit duriori sententia cum eo transactum de existimatione ejus, idcircoque non esse infamem. D. 3. 2. 13. 7.

3. *Carcer ad homines continendos, non ad puniendos haberi debet*: And therefore where the Law doth require that a Prisoner should Co. Lit. f. 260. a. Co 3. Inst. f. 35.

be kept *in salva & arcta custodia*, yet that must be without pain or torment to the Prisoner.

For *severa facit Justitia, non inhumana facit.*

With our Law is agreable the Law Imperial.

D. 48 19. 8. 9. *Solent Praesides in carcere continendos damnare, aut in vinculis contineantur, sed id eas facere non oportet: nam hujusmodi paenae interdictae sunt, carcer enim ad continendos homines, non ad puniendos haberi debet.*

4. *Nemo bis punitur pro eodem delicto.*

Co. lib. 4. Hudson & Lees Case f. 43. In an Appeal one H. counted that the Defendant, *&c. felonice* maimed him in his left hand, the Defendant pleaded, that before, *&c.* the Plaintif recovered in Treſpaſs for the ſame Battery, and wounding 200 pounds and ſatisfaction acknowledged; reſolved, that the Bar is good, for where the Plaintif is to recover damages only, (as in this Caſe of Appeal) he ſhal not be twice ſatisfied for the ſame thing.

Vide Co. lib. 8. Doctor *Bonhams* Caſe 118. *b. lib.* 11. *Foſters* Caſe.

Co. 2. Inſt. 442. Co. Litt. 145. b. Hobarts Reports Moore. v. Huſſey f. 94. 5. *Quis pro alieno facto non eſt puniendus*: no Man, if guiltleſs can be puniſhed for anothers fault: And the reaſon is becauſe the obligation to puniſhment hath his riſe from defect, which being only perſonal, cannot extend to another, neither ought it to go in ſucceſſion.

The Rules of the Civil Law do run with our Law.

Omnis

Omnis noxalis actio caput sequitur. Justit. 4. 8.

Et delicta & noxæ caput sequuntur. D. 16. 3. 1. 18.

Delictum injuriæ adfecti personam non egreditur.

6. *Pœnam in corpus patitur, qui in ære nihil habet.*

By the Statute of *Westminster* 1. c. 20. *de Malefactoribus in parcis*, it is enacted, that if any be attainted at the suit of the Party, he shall be fined, if he hath whereof, if not, he shall be imprisoned.

This rule holdeth good in the *Romans* Law. *Vide* D. 48. 19. 1. D. 2. 1. 7. 3. D. 47. 9. 9.

7. *In dubiis interpretationibus ad mitiora deflectendum est.* Co. 4. Inst. f. 66. Hob. Reports. Courteens Case.

And therefore general Acts of Parliament, which inflict punishment, *viz.* sur forfeiture de Corps & de Avoir, *&c.* ought not to be expounded to extend to life or member, but to imprisonment.

This holds good also in the Imperial Law:

In pœnalibus causis benignius interpretandum est. D. 50. 17. 192. 1.

Interpretatione Legum pœnæ molliendæ sunt potius, quam asperandæ. D. 48. 19. 42.

Judicandum est Legibus, non exemplis. Co. 3. Inst. 212.

5. *Of the circumstances that ought to be weighed touching Pleas of the Crown.*

In all crimes or offences publick, that are brought before a Judge, are to be considered six circumstances.

Bracton lib. 3. c. 6. de generibus pœnarum. Fleta lib. 1. c. 16. de Actionibus criminalibus. Mirror c. 4. sect. 12.

1. *Causa, ut in verberibus, quæ impunita sunt a Magistro, vel a Parente, nisi modum excedant, quia emendationis non injuriæ gratia videntur adhiberi, & puniuntur, cum quis per iram ab extraneo pulsatus est.*

2. *Persona, nam magis delinquit, qui patrem, vel matrem, vel dominum interficit.*

3. *Locus, qui facit, ut idem sit furtum, vel sacrilegium, & secundum hoc minor pœna, vel major.*

4. *Tempus, hoc discernit prædonem a fure, & a Burglatore, furemque diurnum a nocturno.*

5. *Quantitas; hæc discernit furem ab Ambiguo, plus enim peccat qui gregem surripuerit, quam qui ovem.*

6. *Eventus; ut si ex voluntate & conscientia certa fecerit quis aliquid, sicut homicidium an ex eventu: Et secundum hoc, aut erit felonia, aut infortunium.*

Gothofredus on the Digest hath these words.

In factis, dictis, scriptis & Consiliis, Causa, Persona, Locus, Tempus, Qualitas, Quantitas, & Eventus considerandæ sunt. Quintil. 6. Inst. *Atrocitas crescit ex his; quid factum sit, a quo, in quem, quo animo, quo loco, quo tempore, quo modo.*

6. *Of*

6. *Of the Persons to be coesidered in Criminal Judgments.*

The Persons that constitute Judgment criminal are §. Parties, Assistants, and Judge. Of these in their order. 1. Of the Parties in Judgment

The Parties are, Accuser, and Accused, called sometime Appellor, and Appellee, sometime Indictor, and Indictee.

Britton telleth us, that it is not for every Person to accuse or appeal; for a Man outlawed, neither he that hath forjured the Realm, nor a Man attainted, nor an Approver that hath failed in his probation, nor an Infant within the age of 14 yeares, nor a mad Man, nor an Ideot, nor a mute, nor one that is deaf, nor a leper, nor a Man within Holy Orders, are not receivable in Appeals, &c. *Cap.* 22.

The *Mirror* saith, that Women, Infants, Ideots, Lepers, or Professours in Order of Religion, or Clerks, or Persons attainted of felony, or *non compos mentis*, cannot be Approvours. *c.* 1. *sect.* 3.

Now, an Approvour is he who hath committed some felony, which he confesseth, and appealeth or approveth, that is to say, accuseth others, which were coadjutours or helpers with him, in doing the same or other felonies, which thing he will approve; and this proof is to be either by Battaile or by the Countrey, at his election that appealed.

This Accusation is often done before the Coroner,

Coroner, who either is aſſigned to the felon by the Court to take and record that which he ſaith, or is called by the felon himſelf, and required for the good of the Prince and Common-wealth, to record that which he ſhall ſay.

If upon his appeal all thoſe Partners be convicted, the King *ex merito Juſtitiæ* is to pardon him. But it is in the diſcretion of the
21. H. 6. Court either to ſuffer him to be an Approver,
29. b. & 34. b. or after his approvement to reſpite Judgment and execution, until he hath convicted all his Partners.

Note; If a Man that is of good fame be appealed by an approver, by which he is apprehended and kept in priſon, yet he may have a writ, to be directed to the Sheriff, commanding him to ſuffer the Party appealed to be Bayled by good ſureties. But if a Man appealed by an Approver, be kept in priſon, and afterwards the Approver dieth, there he may ſue a Writ directed to the Sheriff, to ſuffer him to be Bayled upon good ſurety, if he be not a notorious felon, although he be not of good fame, *Fitzh. N. B* 250. *d.*

Note further, that before Indictment no perſon can approve, becauſe if his approvement be falſe, no Judgment (whatſoever he
43. Aſſ. Pl. 39. 15. confeſſed) can be given againſt him, unleſs he
E. 3. Cor. 113. 11. be indicted, and no Judgment can be given
H. 7. 5. againſt him, if his Appeal be falſe; but of the offence contained in the Indictment, and ſo are the Books to be underſtood.

Thus much of the Party accuſing.

As

As for the party accuſed or appealed, he is alwayes arraigned either as principal, or acceſſary.

Of theſe diſtinctly and apart.

1. *Of Principals.*

It is a ſure rule, that *in alta proditione, nullus poteſt eſſe acceſſorius, ſed Principalis ſolummodo.* Co. 3. Inſt. 138.

As if many men conſpire to Levy War, and ſome of them do Levy the ſame, according to the conſpiracy, this is High treaſon in all, for in Treaſon all be principalls. Co. 3. Inſt. f. 9.

If a man committeth Treaſon, and thereby becometh a Traitor, if any other man knowing him to be a Traitor, doth receive, comfort and aid him, he is guilty of Treaſon, as principal, for that there be no acceſſaries in High Treaſon. 19. H. 6. 47. 3. H. 7. 10. Co. 3. Inſt. f. 138.

Note, that in the loweſt offences there are no acceſſaries, but all are principals, as in Riots, Routs, &c. Co. Litt. 57. b. Co. 3. Inſt. 20 & 21.

There is another rule; *Nullus dicitur felo principalis, niſi actor, aut qui præſens, aut auxilians actorem ad feloniam faciendam.* 57. Inſt. 20 & 21. Co. 3. Juſt. 138.

But this rule hath his exceptions; for in caſe of poyſoning, if one layeth poyſon for one, or infuſeth it into a broth, or the like, albeit he be not preſent, when the ſame is taken, and either the party intended, or another is poyſoned, yet he is a principal: and in that caſe, both the principal and procurer or acceſſory may be abſent. Co. lib. 4. *Vauxes* Caſe. *Plowd.* Com. 474. *Saunders's* Caſe. Co. lib. 9. *Gores* caſe.

So

Co. 2. Inst. 138. Co. 3. Inst. f. 61.

So there is a felony wherein all be principals, as well before as after, though they be absent at the doing of the felony, but this is specially provided by the Statute of 3. *H.* 7. c. 2. of Taking Women against their wills.

Co. 3. Inst. f. 59. 3 & 4. P. & M. Justice *Dalisons* Reports.

Note, If any be present, abetting, and aiding any to do an Act, though the offence be personal, and to be done by one only, as to commit a Rape, not only he that doth the Act is a Principal, but also they that be present, abetting and aiding the misdoer, are principalls also.

2. *Of Accessary.*

In case of felony, as there be principals, so there be Accessories, and accessories be of two sorts, by the Common Law, and by the Statute Law.

Accessory by the Common Law is also of two sorts §.

1. Accessory before the offence or fact; and it is he that commandeth or procureth an other to commit felony, and is not there present himself, when the other doth it, but if he be present, then he is also a principal: As where I S. doth hold I. X. and commands I. D. to kill him, whereupon I. D. doth give him a wound to his heart, whereof he instantly dies, It is held that both be principals, because both are parties to the wound. 13. *H.* 7. 10. *a.*

So a Woman servant conspired to rob her Mistress, and brought a Stranger to the Bed-

side,

side, where the Mistress lay asleep, the Stranger killed, the servant silent, nothing doing, but holding the candle; the two Chief Justices and Hare, thought the Servant a Traitress and a principal. 2 & 3 Eliz. Dyer f. 128.

If a Man counselleth a Woman to murther the Child being in her Body, and after the Child is born, and then is mudered by the Woman in the absence of him that so gave the Counsel; yet he is accessary before the fact, by his counselling, before the birth of the Infant, and not countermanding it. Dyer f. 186.

Note, that in Man-slaughter a Man cannot be accessary before the fact, for Man-slaughter ensueth upon a sudden debate or Affray, for if it be premeditated, it is murder. Co. lib. 4. f. 44. a.

2. Accessory after the offence, and it is he, that receiveth, favoureth, aideth, or comforteteth any Man, that hath done any murder or other felony, whereof he hath knowledge, such an accessory shall be punished, and shall have Judgmenn of life and member, as well as the principal, which did the felony.

But the Quere may be, whether one may be accessory to an accessory? It is answered, that one may; if one feloniously receive another, that is accessory to felony, there the receiver is an accessory.

Thus much of accessories by the Common Law.

Accessory by the Ssatute Law, is such a one that abbeteth, counselleth, or receiveth any Man, which committeth, or hath committed any offence made felony by Statute; for although

though the Statute doth not make mention of acceſſories; abettours, *&c.* yet they are included by the interpretation of the ſaid Statutes: Becauſe whenſoever an offence is made felony by act of Parliament, there ſhall be acceſſories before and after, as if it had been made a felony by the Common Law.

Co. 3. Inſt. f. 59 & 74. 7. E. 6. Dyer 88.

For the further underſtanding of acceſſories, it will not be unneceſſary to give the Reader ſome certain Rules touching them; and then ſome Queries.

Reg. 1. *Acceſſorius ſequitur naturam ſui principalis:* As if the Wife procure one to murder her Husband, and doth it accordingly, in this caſe the Wife being abſent, is but acceſſory, and ſhall be hanged and not burnt, becauſe the acceſſory cannot be guilty of Petit treaſon, where the principal is not guilty but of murder: and *acceſſorium naturam ſequi congruit principalis*, The acceſſory muſt follow the nature of the principal.

Dyer 16. Eliz. 332. a. Saunders caſe. Co. 3. Inſt. f. 20 & 139.

Reg. 2. 2. *Ubi factum nullum, ibi fortia nulla: Et ubi non eſt principalis, non poteſt eſſe acceſſorius.*

As if the principal and acceſſory be arraigned, and both found guilty, and the principal has his book before Judgment: It was adjudged, the acceſſory ſhall be diſcharged; and alſo if the principal confeſs, and hath his book, the acceſſory ſhall be diſcharged, becauſe Judgment was new given againſt the principall.

Co. 3. Inſt. 114. 3. H. 7. 1. 6. 12. 6. Co. lib. 4. Syers caſe.

So where the principal before attainder is pardoned, the acceſſory is diſcharged.

It is

It is resolved, that where the principal was found guilty of Man-slaughter, and not guilty of murder, and had his Clergy, the accessory shall be discharged, for till Judgment, it doth not appear judicially that there was a principal: But if the principal prayes his Clergy, after he hath had Judgment, or if he be pardoned, yet the accessory shall be arraigned, for it appears judicially that there was a principal.

Co. lib. 4. Syers case. Cro. 1. part. Goss, v. Bybby f. 542. Co. lib. 4. Bibithes Case.

By what has been said, you see that the accessory ought not to be condemned, but where the principal is attainted, and not where he is convicted only, and had his Clergy; which Clergy is a Refuge provided by the Common Law in favour of Learning, to save the life of an offender *Literate* in certain cases; I say in certain cases, because the benefit of the Clergy is taken away in many particulars, as,

Of Clergy.

1. For stealing of horses 1. *E.* 6. *c.* 33.

2. For robbing dwelling houses, *&c.* in or neer the high way. 5. *E.* 6. *c.* 9.

3. For burning of houses, or Barns 5. *Ph. & M. c.* 4.

For stealing of 5. Shillings in any dwelling house, or any place adjoyning, 39. *Eliz. chap.* 15.

5. For Burglary and Rape, 18. *Eliz. c.* 17.

6. For stealing 12 pence or more, without the knowledg of the Person, *&c.* 8. *Eliz. c.* 4.

7. For killing one that hath no weapon drawn. 1. *Jac. c.* 9. *&c.* Co. 3. Inst. f. 39.

But

But to conclude this learning of Clergy; It is a Rule whensoever felony is made by any Statute, and the benefit of Clergy is not taken away, the offender shall have his Clergy.

Reg. 3. The accessory ought not to be put to answer, before the principal be attainted; for 9. H. 7. 19. b. Co. 3. Inst. f. 231. *Juri non est consonum, quod aliquis accessorius in Curiâ Regis convincatur, antequam aliquis de facto fuerit attinctus*: And consequentially by the Reversal and acquittal of the principal, the dependant Judgment against the accessory cannot stand:

And this is agreable to the Rules of the Imperial Laws;

D. 50. 17. 178. *Cum principalis causa non consistat, plerumq; ne eæ quidem, quæ sequuntur locum habent.*

Alciolus. *Quando res aliqua sit accessoria principali, vitiato principali, corruit accessorium.*

Thus much of the Rules, and now for the Quæries with Solutions.

Qu. 1. A Man being made accessorie to two, whether he can be found accessory to one?

Resp. If an Appeal be brought against two, as principalls, and against another as accessory to them, in this case both of them must be Co. 2. Inst. f. 183. attainted, before the accessory be outlawed, and if one of the principals be found not guilty, the accessory is discharged, for the Plaintiff made him accessory to two, and therefore he cannot be found accessory to one.

Whether

Qu. 2. *Whether the Writing of Letters &c. in Favour of a Felon can make him an Accessory?*

Resp. If a man write Letters for a Felons deliverance, or in favour of him, or the like, he is no Accessory, for that he received not the Felon. 26 *Ass. pl:* 47.

Qu 2. *Whether the Instructing of a Felon to Read will make the Person Instructing an Accessory?*

Res. A Vicar Instructing an Approver which could not Read, whilst he was in prison, to Read, whereby he escaped, was adjudged not Accessory to the Felony. Co:3. Inst: *f.* 139.

Qu. 3. *Whether the perswading Witnesses not to Appear to give Evidence against a Felon will make one an Accessory to the Felony?*

Res. *Catlin* and *Brown* Justices of Assize in the County of *Suffolk* put this Case to all the Judges: A man committed Felony in the County of *Suffolk*, for the which he was committed to the Goal, and *R.* an Attorney advised the Friends of the Felon to perswade the Witnesses not to Appear to give Evidence against him, which was done accordingly; And it was Resolved, that neither the Friends, nor the Attorney were Accessories to the Felony, but it was a great Contempt and Misprision, for which they might be fined and imprisoned. *Mich:* 11 & 12 Eliz: *the Case of* Roberts *the Attorney,*

Hitherto of the Parties in Judgements Criminal.

2 *Of the Assistants,* The Assistants in *Judgements Criminal* are of two sorts, the one appertaining to the King, as the Kings Serjeants, his Attorney, and Solicitor General, and the Clerk of the Crown; the other to the party Arraigned assigned to him (upon his prayer) by the Court.

The Duty of the Kings Councel learned in the Laws is to manage the Evidence against the prisoner at his Tryal, and the Function of the Clerk of the Crown is to frame, read, and record all Indictments against Traytors, Felons, and other Offenders Arraigned in the Kings Bench upon any publique Crime.

Note by the Statute of 2 *H:* 4. this Clerk
2 H:4 c:10, of the Crown, if fourscore or a hundred men be Indicted of Felony, or Trespass, of one Felony, or one Trespas, and they plead to an Issue, as not Guilty, the said Clerk ought not to take for the *Venire Facias*, nor for the Entring of the Plea but two shillings only, and not two shillings for every one, which Act is made in affirmance of the Common Law. So if one man be Indicted of two several Felonies, or Trespasses, and is acquit-
26 Ass: pl: 24, ted, he shall pay but for one Deliverance.

As to the Councel belonging to the Party Arraigned, the Law of *England* is thus; Where any person is Indicted of Treason or Felony, and pleadeth to the Treason or Felony, *Not Guilty*, which goeth to the Fact best known to the party; it is holden that the party in that Case shall not have an Advocate assigned

assigned to defend his Cause, or alledge any matter for him; but if the party Arraigned hath any matter of Law to plead, he shall have Councel assigned by the Court, to plead the same, as to plead a general Pardon, or a particular Pardon, or to plead in Arrest of Judgement, if the Verdict be found against him, that the Tryal came not out of the right place, as it fell out in *Arundels* Case convicted by a Jury of wilful Murder, or any other matter of Law. Co. lib. 6. f. 14, Arundels *case*.

Sir *Humphrey Stafford* had an Advocate assigned him concerning the priviledge of Sanctuary, from whence he was drawn by force; but for the matter of High Treason he pleaded his own Cause. 1. H. 7. 7. 22, b.

But though the party Arraigned upon an Indictment of Treason, or Felony, and pleading to the Treason or Felony, *Not Guilty*, which goeth to the Fact, cannot have Councel to give in Evidence, or alledg any matter for him; yet in Appeals which are the Suites of the Subject, Councel is allowed; and the Reason why Councel is not prohibited in an Appeal as it is in an Indictment may be this: There is no Appeal brought, but that of common presumption the Appellant hath malice against the Apellee; and therefore if the Judges should in those Cases shew themselves to Instruct the Appellees, the Appellants would grutch, and think them partial, and therefore as well of the Indempnity of the Court, as of the Appellee in that Case that he be not guilty, the Law suffereth the Appellee *Doctor & Stud. lib. 2. c. 48.*

pellee to have Councel; but when a man is Indicted at the Kings Suit, the King intendeth nothing but Justice with Favour, and that is to the rest and quietness of his faithful Subjects, and to pull away Misdoers among them charitably, and therefore the King will be contented that his Justices shall help forth the Offenders, according to the Truth, as far as Reason and Justice may suffer.

Co 3. Inst. 29. Note, that in *Scotland*, in all Criminal Cases, yea in cases of High Treason *Pars rea* may have Councel learned. Thus much of the *Assistants*.

2 Of the Judge. There is in Criminal or Publique Judgement a two-fold Judg, one of matter of Fact, and that is the Iury, whose Office is to find out the truth of the Fact; the other of Law-matters, and that is the Kings Justice, whose Office is to find out the truth of the Law, *Ad quæstionem facti non respondent Iudices, ita ad quæstionem Iuris non respondent Iuratores.* Of these particularly.

Co Lit. 226. *a. lib.* 4 Heydons *case*, 42 a. *lib.* 9. Dowmans *case*, 13, *a.*

1. *Of the Iury.*

Iurors ought to be persons competent, and that they be such, it is required that every Juror that is returned for the Tryal of the life of man, ought to have three qualities.

Co: Lit, 155, b, 272, *a*, 78, b, 1. He ought to be Dwelling most near to the place where the question is moved, for *Lex intendit vicinum vicini facta scire.*

Stat. 2. H, 5 c, 7, Stat. 3, 2. He that passeth in an Enquest of Life, and death, ought to have Lands and Tenements,

ments, to the value of 40 Shillings.

3. He ought to be leaſt ſuſpicious, that is to be indifferent, as he ſtands unſworn; and then he is accounted *Liber & legalis homo*, otherwiſe he may be challenged, and not ſufferred to be ſworn.

The Determination of the matter of fact by Jurors, is termed in our Law, a Verdict, in Latin *Veredictum*, *quaſi dictum veri ſatis*. Co Lit. 226. a. Co. *lib.* 9. *f.* 13. *a.* *Dowmans* Caſe.

And of Verdicts ſome are general, ſome ſpecial, or at large: It is called a Special Verdict or at Large, becauſe the Jurours find the ſpecial matter atlarge, & leave the Judgment of Law, thereupon to the Court: Of which kind of Verdict it is ſaid, *Omnis concluſio boni & veri Judicii ſequitur ex bonis & veris præmiſſis, & dictis Juratorum.* Touching ſpecial Verdicts in Crown matters, *Vide Cro.* 3. *part. Hallowayes caſe; Cookes caſe f.* 537. Co. Lit. *f.* 226. *b.*

2. *Of the Judge in matters of Law.*

The Judges (that are to decide, and diſcuſſe matters in Law) are bound to obſerve theſe particulars §.

1. They ought to judge *ſecundum allegata & probata: Quotieſcunque ſententiam fert Judex, ſecundum allegata, & probata ferre debet.*

2. They ought to ſee, that the Indictment, Tryal, and other proceeding be good, and ſufficient in Law, otherwiſe they will by their erronious Judgment attaint the Priſoner unjuſtly. Co. 3. Inſt. *f.* 137.

3. The Court ought to be, inſtead of Counſel for the Priſoner, to ſee that nothing be

Co. 3. Inst. f. 29. urged against him contrary to Law and right; nay, any Learned Man that is present, may informe the Court, for the benefit of the Prisoner, of any thing that may make the proceedings erronious.

4. The Judges ought not to deliver their opinions before hand of any Criminal cause, that may come before them judicially, to the end that the Tryal may be more indifferent, seeing the safety of the Prisoner consisteth in the indifferency of the Court: And how can they be indifferent, who have delivered their opinions before hand without hearing of the party, when a smal addition or substraction may alter the Case?

Co. 3. Inst. 29.

5. Judges ought in giving Sentence, especially in ambiguous Cases, to avoid precipitation, because *ad pœnitentiam properat cito, qui judicat. Festinatio Justitiæ noverca.*

Co. Lib. 9. Dowmans Case 13. a.

Touching Temerity or Hastiness, take these foreign Authors:

Temeritas est, damnare quod nescias, sayes *Seneca.*

Temeritate omnis actio vacare debet; Cicero 1. Offic. *Nihil temeritate turpius*; Id. de Natura. *Nihil a gravitate Sapientis temeritate disiunctius.* 4. Academ.

Deliberabo, Lex vult nihil temere fieri: sayes *Seneca* lib. 2. Controv. 11.

Hitherto of the Persons that are conversant in Judgment touching publick Crimes, or offences.

7. Of

7. *Of the Matters of Judgments Criminal; and how they are brought to a Judicial Deciſion.*

The things or matters of publick or criminal Judgments are Cauſes proceeding from High treaſon, Felony, or other Miſdemeanours.

Touching High treaſon and Felony, two things are to be obſerved.

1. In antient time, every Treaſon was comprehended under the name of Felony (but not *e contra*;) and therefore in our antient Books, by the Pardon of all felonies, High treaſon, or Counterfeiting the Great Seal, and of the Kings Coyn, *&c.* was pardoned. But the Law now is, and of long time hath been otherwiſe holden: And therefore by the Law at this day under the word Felony, in all commiſſions, *&c.* are included Petit treaſon, Murder, Homicide, Burning of Houſes, Burglary, Robbery, Rape, *&c.* Chance-medley, *Se defendendo*, and Petit Larceny; but not High treaſon, for it is not comprehended under the word Felony; and therefore ought to be eſpecially named, in the Kings Pardon or Charter.

2. E. 4. 14. 18. H. 4. 10 23. Aſſ. P. 19.

Co Litt. 391. 4.

2. That criminal, or publick Cauſes are called Pleas of the Crown, but they are not ſo called, as ſome have ſaid, becauſe the King *Jure Coronæ*, ſhall have the Suite and Common Pleas, becauſe they be held by

Co. 2. Inſt. f. 22.

Common Persons, for a Plea of the Crown may be holden betwixt Common Persons, as an Appeal of Murder, Robbery, Rape, Mayhem, &c. and the King may be party to a Common Plea, as a *Quare impedit*, and the like,

But now, how these criminal matters are brought to a judicial hearing, is the question; It is answered, that they are brought by way of Accusation, and Exception.

1. *Of Accusations.*

Accusation doth proceed either by way of Appeal, or by way of Indictment; and first of Appeals.

Appeal.

Co. Litt. 123. b. 126. b.

Appeal, *Appellum*, cometh of the French word Appeller that signifieth to accuse, or to appeal, or appeach. An Appeal is therefore an Accusation of one upon another, with a purpose to attaint him of Felony, by words ordained for it.

Co. Litt. 287. b.

Now Appeals are of three sorts:

1. Of wrong to his Successor, whose heir he is, and that is only of Death, which is of two sorts, of Murder, & of Manslaughter; but of Chancemedley, no Appeal doth lye.

As touching Appeal of Murder this Quære is put.

Qu. *Whether Tryal of Murder by Appeal ought to be brought in the County, where the fact was committed?*

Resp. It is adjudged, that in an Appeal of Murder, the writ shall abate if it be not brought in the County, where the fact was committed; for it is against a fundamental Rule of Law, that a Tryal of murder by Appeal,

Appeal, or otherwiſe, ſhall be out of the County where it is perpetrated: And for this cauſe, it was doubted at the Common Law, where a ſtroak were given in one County, and death enſued in another, how it ſhould be tryed? And to avoid this doubt the Stat. of 2. *E.* 6. was made. Cro. 3. part. *Sontley, v. Price* 247.

But it alwaies was clear, that a fact in one County ought not to be tryed in another.

Note, the Stat. of 26. *H.* 8. *c.* 6. allows that Indictments may be in County's next adjoyning; but there is not any mention of Appeals; and for this reaſon Certioraries have been granted, to remove Indictments out of the Grand Seſſions in Wales.

2. Of wrong to the Husband, and is by the Wife only of the death of her Husband to be proſecuted: Touching this kind of Appeal I propoſe theſe Queries, with Reſolutions on them. Co. Litt. 33. *b.*

Qu. 1. *Whether a Wife* de facto, *ſhall have an Appeal?*

Reſp. Some do hold, and ſo do I, that a Wife *de facto*, ſhall have an Appeal of the death of her Husband, but only ſhe that is Wife *de jure in favorem vitæ*; and that there ne unques accouple en loyal Patrimony, ſhall be taken *de jure* ſtrictly.

Qu. 2. *Whether the Wife can have an Appeal, although ſhe cannot have a Writ of Dower?*

Reſp. The Wife ſhall have an Appeal, where ſhe cannot have a Writ of Dower, as if ſhe Elope, *&c.* ſhe is barred of her Dower, but Co. Litt. 33. *b.*

not

West. 2. c. 34. Co. Litt. 33. b. 37. a. Co. 3. Inst. f. 215 35. H. 6. 63.

not of her Appeal; and the reason is, for that the Stat. barreth her of her Dower, but not of her Appeal.

So if the Husband be attainted of Treason, or Petit treason, his Wife shall not be endowed; and yet if any do kill him, the Wife shall have an Appeal; for notwithstanding the Attainder he remained her Husband.

Qu. 3. *Whether she ought to be sole and unmarried, that brings an Appeal of her Husbands Death?*

Resp. It is requisite, that she be sole and unmarried, that makes this Appeal; for if she marry again, her Appeal is gone, though the new married Husband be dead within the year and day, after his death that was slain.

The Womans Law. b. 5. ult. 1.

Qu. 4. *Whether the taking of a second Husband after Judgment, and before Execution, can hinder the Execution of the Judgment?*

Resp. Not only a Widdow, which hath an Appeal hanging, abateth her Appeal, and loseth it force, by new Marriage; but also if after Judgment and before Execution, she take an Husband, she loseth the Execution of the Judgment.

smaH. 4. 41

Qu. 5. *What is the true reason, why a Woman hath an Appeal* de morte Viri?

Resp. The reason wherefore this Action is given to a Widdow, is not as *Glanvil* makes it, *Quia una caro est vir & uxor*; for then the Baron might have an Appeal *de morte uxoris*, which is never granted, but her heir shall have it: But the true reason why a Woman hath the Appeal *de morte Viri*, is because by his death

The Woman Lawyer lib.

death she is thought less able to live and maintain her self, & that therefore when she taketh another Husband, *cessante causa, cessat effectus*; and her Appeal is gone, as 11 Widdowes Quarentine is determined, when she is once remarried.

3. Of wrong done to the Appellants themselves, as Robbery, Rape, and Maihem. 1. *Robbery.*

If in an Appeal of Robbery, the Plaintiff omit any of the goods stoln, they are forfeit to the King, for the favour, which the Law presumeth the Plaintiff beareth to the Felon: and for that he cannot have restitution for more then is in his Appeal. Co. 3. Inst. f. 227.

If the Jury find in an Appeal of Robbery for goods, that the Defendant found them in the High-way, in this case the Plaintiff for his false Appeal, seeking the blood of the Innocent, shall forfeit his goods to the King. 2. E. 3. Cor. 367, & 368.

If any Virgin, Widdow or single Woman be ravished, she her self may sue an Appeal of Rape, prosecute the Felon to death, and the Kings Pardon cannot aid him. 2. *Rape.*

But if a Feme Covert be ravished, she cannot have an Appeal without her Husband, as appears 8. *H.* 4. 21. If a Feme Covert be ravished, and consent to the Ravisher, the Husband alone may have the Appeal, and this by the Stat. of 6. R. 2. c. 6. And the Husband that this Statute speaketh of, which may sue the Appeal, must be a lawful Husband, in Right and possession; for *ne unques accouple en loyal Matrimony*, is a good Plea against him. 11. H. 4. 13.

An

3. *Maihem.* An Appeal of Maihem was brought by one *Milles*, and the Maihem was assigned in his shoulder; and the Defendant demanded the view, and it was said, that he should not have it, because it was done de son tort demesne: also it was said, that Surgeons may heal and cure him, and although he shall be tryed by Inspection of the Court, or by Chirurgeons, it was held be it one way or other, it is peremptory for him, *&c.*

21. H. 7. 23. b.

It was held by all the Justices of the Kings Bench, that in an Appeal of Maihem, if the Defendant pray that the Maihem may be examined; if the Justices or Surveyors which they require, be in doubt whether it be a Maihem or not, the Judges may refuse the examination, and compel the Party to put it upon the Country.

21. H. 7. 40. a.

Thus much of wrong done to the Appellants themselves.

I shall conclude this Learning touching Appeals with these Queries.

Qu. 1. *Whether all Appeals ought to be sued in proper Person?*

Resp. It is answered, that all Appeals are to be sued in proper Person, and not by Attorney, as Appeal of Maihem must be in proper Person. A Woman, which was Grosse ment enseint, sued this Appeal; and the Defendant was attainted, the Womans Appearance was recorded for the whole Terme; and yet by the better opinion, she might not pray Execution by her Councel, but ought to come in proper person: therefore one of the Judges did

21. E. 4. 72, & 73.

The womans Lawyer lib. 5. sect. 2.

did ride to *Islington* to her, to see if she were alive, and desired Execution, which she required, and the Defendant had Judgment.

Qu. 2. *Whether an Appeal may be commenced more then one way?*

Resp. It is answered, that Appeals are commenced two wayes, either by Writ, or by Bill.

1. By Writ, when a Writ is purchased out of the *Chancery* by one Man, against another, commanding him that he shall appeal a third Man of some felony, or other offence by him committed, and to find Pledges, that he shall do this with effect, and this Writ is to be delivered to the Sheriff to be recorded.

2. By Bill, when a Man of himself giveth his Accusation of another Man in Writing to the Sheriff, or Coroner, and taketh upon himself the burthen of appealing him that is named in the said Writing.

And note, that there is a diversity worthy of observation, betwixt an Appeal by Bill, and by Writ: for in the Appeal by Original Writ both principals and accessories, are generally charged alike, without any distinction, who be principals, and who be accessories: but otherwise in the Appeal by Bill. Co. 2. Inst. f. 183.

Thus much of the Accusation by way of Appeal. I proceed now to speak of the other kind of Accusation; *viz.* by Indictment.

Indictment cometh of the *French* word *enditer*, and signifieth in Law an Accusation found by an Enquest of 12 Men, or more upon *Indictment* Co. Litt. f. 126. b.

upon their Oaths, and the Accuſation, in Latin is called *Indictamentum.* And as the Appeal is ever the Suite of the Party, ſo the Indictment is alwayes the Suite of the King, and as it were his Declaration.

For the clearer underſtanding of Indictments, take theſe following Rules.

Reg. 1. That there be words ſo appropriated to offences criminal, that they cannot be Legally by any other words, or Periphraſis.

Rape. The word *Rapuit*, in an Indictment of Rape, muſt be uſed, for *carnaliter cognovit eam*, or the like will not ſerve.

Co. Lit. 124. *a. Co.* 2. *Inſt.* 180. *Cro.* 2. *part.* Fitzwilliams *Caſe.*

Murder. An Indictment, *Quod felonice, & ex malitia ſua præcogitata occidit*, ſuch a one without ſaying, *Murdravit*, is no Indictment for Murther, although theſe words *Tantamount. Cro.* 3. *part.* Fitzwilliams *Caſe Co. l.* 4. Brookes *Caſe* 39. *b.* 8. *E.* 6. Dyer 69. *a.* 304. *b.*

High treaſon. No Indictment can be of High treaſon, without this word (*proditorie*) *Co.* 3. *Inſt. f.* 15, & 4.

Maybem. In an Indictment of Maihem (*Maihemavit*) cannot be expreſſed by any word, as *mutilavit, truncavit*, or the like, *Co. Litt.* 126. *b.*

Felony. The word *Felonice*, muſt be uſed in all Indictments of Felony, and cannot be expreſſed by any other word. *Co. Litt.* 391. *a.*

Reg. 2. Falſe Latine ſhall not quaſh an Indictment, if the word be ſenſible. *Co. leb.* 5. Lowes *Caſe.*

It is moved in Arreſt of Judgment, that an

an Indictment was not good, being *fecerunt*, whereas it was found only *Bill a vera* against one; *sed non allocatur*: Because it was exhibited against two, and it is but false Latine. Cro. 3. part. *Cholmo leges* Case.

Misrecital of a Statute, being fatal in Indictments, the sure way is to draw the Indictment with conclusion *contra formam Statuti*, and with no Recital of the Act. *Co. l.* 4. 48. *a.* Reg. 3.

Every Indictment ought to have the Addition of the Party indicted, and his place of Abode. *Cro.* 2. *part.* Reads *Case, and* Johnsons *Case*, 610. Reg. 4.

In all Cases of death, the word *percussit*, ought to be used, except in case of poysoning: *Co. lib.* 5. Longs *Case.* Reg. 5.

Where a Man indicted, is not convicted, or acquitted, he may be arraigned upon a new Indictment. *Cro.* 3. *part.*: Withipools *Case.* Reg. 6.

Where the substance of the Indictment, no matter for circumstances: As if *A.* be indicted of murder, *viz.* that he of malice prepensed killed *IS*: *A.* pleadeth, that he is not guilty *modo & forma*; yet the Jury may find him guilty of Man-slaughter, without malice prepensed, because the killing of *IS.* is the matter, and malice prepensed is but a circumstance. Reg. 7. Co. Litt. *f.* 282. *a.* lib. 9. *Mackaleyes* Case.

From Accusation (both by way of Appeal and Indictment) which is as it were the Declaration. I proceed to the Pleas of the Parties accused, which are denominated exceptions.

Now,

Now, the Pleas or Exceptions in Indictments or Appeals, are these §.

Auterfoitz attaint d'un auter offence, Auterfoitz Acquit, Auterfoitz convict de meſme le Felony devant Judgement, Auterfoitz convict d'un auter Felony, & auterfoitz attaint de meſme le offence.

Of theſe briefly in order.

1. Auterfoitz attaint d'un auter Offence.

It is a ſore ſaying, which ſome Men have to plead for themſelves, *viz.* That they are already condemned to be hanged, and ask Judgment; whether during the attainder, they ſhould anſwer to the felony, whereof they are condemned, or to any other: And this plea ſerveth where the Party condemned hath already forfeited, as much as he can forfeit; ſo that it is to no purpoſe to travel him any further. But in ſome ſpecial caſes, when there is ſome end of it, a Man already condemned, may be arraigned again.

Co. 3. Inſt. f. 213. As if a Man attainted of felony, were guilty of Treaſon alſo, at the time of the felony committed, he may now be put to anſwer the Treaſon, notwithſtanding his Attainder of felony, becauſe the King thereby was entitled to have the forfeiture of all his Landes, of whomſoever they were holden. 1. *H.* 6. 5. Otherwiſe it is, if the Treaſon were committed after the Felony; or at the leaſt,

least, if it were after the Attainder had of the felony, for then the Title vested in the Seigniours, before the Kings Title, might not be devised by matter accruing *ex post facto*; but if a Man be attainted of Treason, he cannot be after attainted of a former Treason. *v. Cro. 2. part.* Sr Walter Rawleighs *Case*: 435.

But the Queries may be,

Qu. 1. *Whether in divers Appeals of Robbery against one Person, he shall be attaint at every one of their Suits?*

Resp. It is answered, that if divers Men have divers Appeals of Robbery against one, to the end that every Man may have again his goods, wereof he was robbed, by making fresh Suit, he shall be attaint at every one of their Suits. *The Womans Lawyer lib. 5. fol. 13.*

Qu. 2. *Whether an Appeal of Robbery doth lye for a Robbery done before the felony, of which the Party was attainted?*

Resp. It is answered, that the Party may have his Appeal of Robbery, for a Robbery done before the felony, whereof he was attainted; because in the Appeal he is to have Restitution of his goods, besides Judgment of death. *Co. 3. Inst. f. 213.*

Qu. 3. *Whether a Man attainted of Petit Larceny, can be after attainted of Felony?*

Resp. It is answered, If a Man be attainted of Petit Larceny, he may be attainted of felony, for the which he shall have Judgment of death, because it is an higher offence, and is to have another Judgment. *Ibid.*

Qu. 4. *Whether a Man attainted of felony,*

and pardoned, shall answer at the Kings Suit, to other felonies committed before, and whereof he was not indicted at the time of the Attainder?

Resp. It is answered, that *per aliquos videtur quod ita*, as well as at the Suit of the Party in an Appeal, yet some held otherwise, 10. *H.* 4. That a Man can die but once at the Suit of the King, and he that is pardoned, is as a New Man, all Judgments, as against the King, being determined.

But note, If a Man be adjudged to his Penance of Paine, Fort, and Dure; yet he may be impeached for any former felony, because the Judgment is not given for the felony, but for his Contumacy.

Dyer 14. Eliz. 308. Cobhams Case.

2. Autrefoitz acquit.

This Plea the Common Law doth allow, because it commandeth, that a Mans life should not be put in *Jeopardy* twice for one, and the same offence. But then the Acquital must be of the very same offence, or else his Plea is to no purpose: Therefore if two Men be indicted of felony as principals, and afterwards by another Indictment, it is found that one of them did the felony, and the other did feloniously receive him, after the felony committed; he that is secondarily indicted, and arraigned as accessary, shall not be discharged, by pleading arraignment, and acquital upon the first Indictment, for the offence is not supposed the same, and one, but

committed

committed at divers daies, 27. *Ass. Pl.* 10. And this for Accessaries after the felony: But when felony is done by force of Commanding, and procurement of another, he that shall be arraigned as Accessary, may plead that he was acquit, *&c.* though it were as principal, and the offences were at divers daies; for *vnlnus, præceptum & factum, sunt quasi unum factum.*

Note, in an Indictment or Appeal of death, if it be found that he killed him in his own defence, he is acquited of the felony for ever. Co. 3. Inst. f. 213, & 214.

3. Autrefoitz convict de meisme le felony devant Judgement.

If a Man commit murder, and be indicted, convict, or acquitted of Man-slaughter, he shall never answer to any other Indictment, of the same death, for all is one; and the same felony for the same death. Co. Lib. 4. *Holecrofts* case.

Wetherel brought an Appeal against *Darby* of murder, the Defendant pleaded Non culpable, and was found guilty of Man-slaughter, and had his Clergy; afterwards he was indicted of murder, and upon it arraigned at the Kings Suit, and he pleaded the former conviction in the Appeal at the Parties Suite, and it was adjudged a good Barre, ad thereupon discharged, for this was a good Barre at the Common Law, and restrained by no Statute, and the reason is, because the Life of Man shall not be put twice in *Jeopardy* for the same offence. Co. lib. 4. fol. 40. f.

4. Auterfoitz convict d'un auter felony.

Before the Statutes of Qu. *Eliz.* c. 4. and 18. *Eliz.* c. 6. If a Man had committed divers felonies, if he had been indicted of the laſt, and had the benefit of his Clergy, he could not have been impeached for any of the former felonies; albeit for the ſame he could not have had his Clergy: by the Act it is provided, that notwithſtanding the allowance of ſuch Clergy, he may be impeached for any former offence, for which he could not have had his Clergy.

5, *and laſt*, Auterfoitz attaint de meſme le offence.

Auterfoitz attaint of the ſame felony, was a good Plea, as well in an Indictment, as in an Appeal at the Common Law: But by the Stat. of 3. *H.* 7 c. 1. in an Appeal of death, at the Suit of the Party, auterfoitz attaint de meſme le mort, is no Plea at this day: But in caſe of an Indictment of death at the Suit of the King; auterfoitz attaint de meſme le mort in Appeal is a good Plea.

Co. 3. Inſt. 213.

Auterfoitz attaint de murder, is a good Plea to an Indictment, &c. of Petit treaſon of the ſame death; for in effect it hath the ſame Judgment, and the ſelf ſame forfeiture.

Co. 3. Inſt. f. 213.

So likewiſe a Man may be attainted of Man-

Man-slaughter, it is a good barre to an Indictment of murder of the same death, and *e converso*.

Thus much of matters Judicial in criminal offences, I go on now (according to our first proposed Method) to the Acts Judicial.

8. *Of Judicial Acts, relating to publik Crimes.*

Touching these Judicial Acts, there are worthy of consideration these particulars.

The manner how Causes criminal are brought to Tryal. 2. The Judgment or Sentence upon that Tryal or Arraignment. 3. The Execution of that Sentence. 4. The means whereby the Judgment or Execution may be escaped, or delayed.

No Man is said to be arraigned, but meerly at the Suit of the King, upon an Indictment found against him, or other Record, wherewith he is charged. And there the Arraignment of the Prisoner is to take order, that he appear, and for the certainty of the Person, to hold up his hand, and to plead a sufficient plea to the Indictment, or other Record; whereupon they which follow for the King may orderly proceed. 1. *The manner of Arraigning a delinquent.* Co. Litt. 263. a.

If the party accused of Treason or Felony, &c. do at his Arraignment before the Judge deny the offence; or as we say, plead Not-guilty, then shall he be tryed by a Jury of 12

Men, dwelling nigh to the Vill, where the offence was comitted, such Men as to the Party accused be nothing allyed, to certify the Judge upon the truth of the fact: which at their appearance, the Party arraigned may challenge peremptorily upon his own dislike, without shewing any cause, *in favorem vitæ*, the number of twenty in murder, and other Felony: And in case of High treason, Petit treason, and Misprision of treason, he may challenge to the number of 35: And if he challenge peremptorily above 35 in case of Treason, or Petit treason, he forfeiteth his goods, and Judgment of pain, fort and dure shall be given against him, as one that refuseth the Tryal of Law, by challenging 3 full Juries.

Co. Litt. 156. b.

Co 3. Inst. f. 227 & 228.

Otherwise in case of Felony, for no Law giveth forfeiture for challenging above twenty; but the Court is to over-rule the Challenge.

Co. Litt. 156. b.

But note, that in case of Treason or Felony, the Party arraigned may challenge for just cause, as many as he can.

2. But if the Party upon his Arraignment, in case of Felony, refuse to answer, according to Law, or say nothing, he shall not be Judged to be hanged, but for his contempt, he shall undergo pain, fort and dure, which makes no Attainder for the felony, nor forfeiture of his Lands, nor corruption of Blood: Otherwise in case of High treason; for if the Party refuse to answer according to Law, or say nothing, he shall have such Judgment by Attainder, as if he had been convicted by Verdict or Confession.

Co. Litt. 391. a. Co. 3. Inst. 14, & 217.

3. If

3. If the Party arraigned be found Guilty by Verdict or Confession, then he is said to be convicted, which is before he hath Judgement or Sentence; and thereupon he doth forfeit his goods and Chattels. Co. Litt. 391. a.

But note, that the begging of the goods or Estate of the Delinquent, indicted of any Treason, Felony or other offence, before he be convicted and attainted is utterly unlawfull, because before Conviction and Attainder nothing is forfeited to the King, nor granted by him. Co. 2. Inst. 48. Co. 3. Inst. 137 & 229.

And besides it either makes the Prosecution more violent and undue, then quiet and equal proceeding of Law and Justice would permit; or else by under-hand Commission and agreement, hinder the due course of Justice, for examplary punishment of the offender. Co. 3. Inst. 229.

Note further, that before Indictment, the goods or other things, of any criminal cannot be searched, Inventoried, or in any sort seised, nor after Indictment seised and removed, or taken away, before Conviction, or Attainder. 2. *Of the Judgment or Sentence pronounced.*

Thus much of the manner touching the Arraignment of a Delinquent.

Assoon as Judgment, or Sentence is pronounced by the Judge, the Party arraigned is said to be attainted, **e mort en Ley**: But though the Delinquent by the Attainder be a dead Person in Law, yet maugre the Attainder, his Body may at the Suit of a Subject be taken in execution, upon a Judgment or Stat. Co. 2. Inst. f. 215, 213.

Cro. 1. part. *Ognell, v. Paſton.* &c. And he may be executed for Treaſon, or felony, notwithſtanding ſuch Execution had againſt him.

Cro. 1. part. *Truſſel's* Caſe. As to Attainder, take theſe Queries, together with Solutions.

Qu 1. *Whether there be a diverſity betwixt an Attainder and an Entry into Religion?*

Reſp. There is a great difference between an Attainder of treaſon or felony, and an Entry into Religion; for he that is attainted of treaſon or felony, hath capacity, and may purchaſe Lands to him and his Heirs; but ſo cannot he that is entered into Religion.

Co. 3 Inſt. f. 215.

Qu. 2. *When a felony is perpetrated, whether there be a Diſcrimination in Law betwixt purchaſing of Lands before, and after Attainder?*

Reſp. If a Man commit felony, and after purchaſe Land, and then is attainted, he has capacity to purchaſe, but not to hold it, for in that caſe the Lord of the fee ſhall have the Eſcheat: But if a Man attainted of felony purchaſe Lands, in this caſe the King ſhall have it by his prerogative, and not the Lord of the fee; for a Man attainted hath no capacity to purchaſe, but only for the benefit of the King.

Co. Litt. f. 2. b.

Qu. 3. *Whether a Perſon attainted after a Pardon, can have an Action of Battery, &c. committed before the Pardon?*

Reſp. If a Perſon be beaten, or maimed, or a Woman attainted, be raviſhed, after Pardon, they ſhall have an Action of Battery, Appeal of Maime, or Rape.

Co. 3. Inſt. 215.

It is

It is to be known, that there be two manner of Attainders; the one after appearance, and that in 3 manners: by Confeſſion, by Battel or by Verdict, the other upon Proceſſe to be outlawed, which is an Attainder in Law: But upon every one of theſe Judgment ought to be given, otherwiſe it ſhall not be ſaid an Attainder. Co. Litt. 390. b. Perkins. ſſ. 27.

Now, as upon conviction a Delinquent forfeiteth his good and Chattels; ſo upon Attainder, that is by Judgment given, his Lands and Tenements are forfeited: But touching the forfeiture of Lands, there is a diverſity betwixt an Attainder of felony, by outlawry upon an Appeal, and upon an Indictment; for in the caſe of an Appeal of death or other felony, Proceſs being awarded againſt the Defendant, and hanging the Proceſs the Defendant conveyeth away the Land, and after is outlawed, the conveyance is good, and ſhall defeat the Lord of his Eſcheat: But if a Man indicted of felony, and hanging the Proceſs againſt him, he conveyeth away the Land, and and after is outlawed, the conveyance ſhall not in that caſe prevent the Lord of his Eſcheat, For in the caſe of the Appeal, the Writ containeth no time, when the felony was committed; and therefore the Eſcheat can relate, but to the outlawry pronounced; but the Indictment contriveth the time, when the felony was committed; and therefore the Eſcheat upon the outlawry ſhall relate to that time. Co. Litt. 390. b, & 13. a, b.

But note, that in caſe of an Indictment, there

there is also a difference observed; for (as hath been said) it shall refer to the time alledged in the Indictment for avoiding of Estates, Charges and Incumbrances made by the Felon, after the perpetration; but for the mean profits of the Land, it shall relate only to the Judgment, as well in the case of outlawry, as in other Cases.

Co. Litt. 390. b. Plowd. Com. f. 488. b.

There is a Question raised in the Case betwixt *Grosse* and *Gayer*; *viz.* Whether an Attainder to a *præmunire*, shall have relation to the offence for the forfeiture of his Lands, or only to the time of the Judgment pronounced: But the Judges did give no Resolution of it, being a point of difficulty:

Cro. 3. part. f. 172 & 173.

Note; All the Attainders, as to Goods and Chattels, shall have relation but unto the Judgment given; so that a gift, *&c.* made of such Goods, by a Felon before the Judgment, is good.

Perkins sect. 29.

Touching Alienations by a Criminal, the Civil Law says thus:

Post contractum capitale Crimen donationes factæ non valent ex constitutione Divorum Severi & Antonini.

D. 39. 5. 15.

Si quis mortis causa donaverit, & pœna fuerit capitis affectus, removetur donatio ut imperfecta, quamvis cæteræ donationes sine suspitione pœnæ factæ valeant.

D. 39. 6. 7.

Having shew'd the Law touching Alienations, I shall present to the Reader's view the things imply'd at this day, both in the Judgment of Treason and Felony.

1. *In*

1. *In the Judgment of High Treason.*

In the Judgment relating to *Crimen læsæ Majestatis*, is imply'd at this day,

First, the forfeiture of all the Traitors Manors, Lands, Tenements, and Hereditaments, in Fee simple, or in Fee Tayle, of whomsoever they be holden. Co. 3. Inst. 211. Co. 3. Inst. 19. 26. H. 8. c. 13. 33. H. 8. c. 20. 5. & 6. E. 6. c. 11.

Also of Rent-Charges, Rents seck, Commons, Corodys, and other Hereditaments, which are not holden, for in case of High treason, the Tenure is not material.

Also of Uses, Conditions (unless inseparably knit to the Person) of Rights of Entry, of Lands in the Right of the Wife, during the Coverture; of the profits of Land, which the delinquent hath for life, during his life; of trusts in Chattels Reals; but not of Freehold. *Cro. 2. part f. 512. Pl. 23. vid. Andersons Reports, Inglefeilds Case, Co. lib. 12. f. 6. Dyer 288. b, & 289. a.* 33. H. 8. c. 20. 5. E. 6. c. 11. Co. lib. 7. Inglefields Case.

Note, that Rights of Actions, where the Entry is taken away, are not forfeitable.

Secondly, his Wife to lose her Dower.

Thirdly he shall lose his Children, for they become base and ignoble.

Fourthly, he shall lose his Posterity, for his Blood is stained and corrupted, and they cannot inherit to him, or any other Ancestor.

Fifthly, all his Goods and Chahttels are forfeited, *&c.* and reason is (says *Coke*) his Body, Lands Goods, Posterity, *&c.* should be torn, pulled

pulled asunder, and destroy'd that intended to tear and destroy the Majesty of Government.

2. *In Judgement of Felony.*

A felon impliedly is punished in these particulars.

Co. Litt. f. 41. a. 392. a, b. Co. 3. Inst. 47.

1. He doth lose his Children, that they shall become base and ignoble.

2. He shall lose his Posterity, for his blood is stained and corrupted, that they cannot inherit unto him, or any other Ancestor.

3. He shall forfeit all his Lands and Tenements, which he hath in Fee, and which he hath in taile, during his life.

4. All his Goods and Chattels.

Note, that before the Stat. 1. E. 6. c. 2, & 5. E. 6. c. 11. the Wife of a Person attainted of Misprision of treason, Murder or Felony, losed her Dower; but since she is dowable by these Statutes. Hitherto of the Judgment or Sentence it self.

3. *Execution of the Judgment pronounced.*

In doing of Execution, both in Treason and Felony, two things are worthy of the Reader's notice.

Co. 3 Inst. f. 52. 211. 212.

1. That it be done by the right Officer, as the *Sheriff* or *Marshal*, for if any other execute offendours it is felony.

Execution must be made by the *Sheriff* or *Marshal*, according to the Judgment: for it is a maxime in the Law of *England*, *Non alio modo puniatur quis quam secundum quod se habeat Condemnatio.*

Punish-

Punishment may be avoided or escaped, in part or totally, either

1. By the means of Justice, as
   - By Writ of Error,
   - or
   - Falsifying the Attainder.
2. By the means of Mercy, as
   - By the Kings Pardon,
   - or
   - By Restitution: of these in their order.

4. *Of the means by which the Judgment or Execution may be avoided in part, or in all.*

2. *Of Writs of Error.*

If the Judgment be erronious, both the Judgment and Execution thereupon and all the former proceedings shall be reversed by Writ of Error: but if the the former proceeding, and the Execution be erronious, the Execution only shall be reversed.

2. *Of Falsifying Attainder.*

To falsify in Legal understanding is to prove false, that is to avoid, or to defeat the Attainder, in Latin *Falsare, seu falsificare, falsum facere.* Co. 3. Inst. f. 210.

Whereseoever the Judgment is void, or *coram non Judice*, the party is not driven to his Writ of error, but may falsify the ttainder by Plea, shewing the special matter, which proveth it void, or *coram non Judice*: In which case the Party forfeiteth neither Lands, nor Goods. Co. 3 Inst. f. 231.

If a Man committeth Treason, or felony and is

is thereof attainted in due form of Law, and after this Treason or Felony, is pardoned by a general Pardon, hereby the foundation is self, *viz.* Treason or Felony, being by Authority of *Parliament* is discharged & pardoned; the Attainder (being builded thereupon) cann't stand, but may be satisfy'd and avoided by Plea, for he hath no other Remedy by Writ of error, or otherwise.

Dyer 20. *Eliz.* 135. Co. Lib. 6. *f.* 13 & 14 *in Arundels* Case.

If *A*, be indicted before the Coroner for the death of another, and that *A*, fled for the same, hereby are all the Goods and Chattels of *A*, forfeited, which he had at the time of the Verdict given: and this cannot be falsified by Traverse. If the Party be arraigned upon the same Indictment before Justices of Gaol delivery, and is by Verdict acquitted of the Felony, and that he did not fly for the same; yet he shall forfeit his Goods and Chattels: But such a *fugam fecit* may be satisfy'd by matter in Law; for if the Indictment be void or insufficient, there is no forfeiture.

Co. 3. Inst. *f.* 233.

Co. Litt. 373. *b.*

3. *Of Pardons.*

Touching Pardons, these particulars are worthy of observation.

1. *The Etymology of the word* Pardon.

Pardon in Latin is called *Perdonatio*, which is derived *a per* and *dono*: *per* is a Preposition, and in the *Saxon* Tongue for is *orvor*: as to forgive is throughly to remit, and fore-think is to repeat, & forbear is to bear with patience.

Co. 3. Inst. *f.* 233.

A Pardon is a work of Mercy, whereby the King doth remit, or forgive a felonious offence,

offence, perpetrated against his Imperial Crown, either before Attainder, or Conviction, or after.

2. *The Description of a Pardon.*

A Pardon (says one) is twofold; one *ex gratia Regis*, the other per Course del Ley, by Course of Law. Pardon *ex gratia*, is that which the King in some special regard of the Person, or other circumstance, sheweth or affordeth upon his prerogative Royal or power. Pardon by course of Law, is that which the Law in equity affordeth for a light offence, as Homicide casual, when one killeth a Man having not such meaning. *West. Part.* 2. *Symb. Tit. Indict. Sect.* 46.

3. *The Division of Pardons.*

All Pardons of Treason or Felony (says *Coke*) are to be made by the King, and in his Name only; and are either general, or special: All Pardons either general or special, are either by Act of Parliament (whereof the Court in some Cases shall take notice) or by the Charter of the King (which must always be pleaded:) And these again are either absolute, or under Condition, Exception or Qualification.

General Pardons are by Act of Parliament, and if any of these Pardons be general and absolute, the Court must take notice of them, though the party plead it not, but would waive the same.

Co. 3. Inst. f. 234.

No particular Pardon, be it at the Coronation or any other, or any offence or offences whatsoever, that is absolute without any condition, *&c.* need any Writ of Allowance; but when the Pardon is conditional by force of the Act

4. *The Allowance of Pardons.*

Co. 3. Inst. f. 234, 235. Act of 10. E. 3. c. 2. there a Writ of Allowance out of *Chancery*, testifying that the Condition is performed, *viz.* surety found according to that Act, may be had, or the Party may plead the finding of Surety, *&c.* and vouch the Record.

Touching Allowance of Pardons, I shall mention two Cases out of *Crokes* Reports.

Cro. 3. part. Mints his Case. First, upon the 14 day of *November* 1640, Sir *Matthew Mennes*, Knight of the *Bath* (who was convicted of Man-slaughter, and had his Clergy and his burning in the hand was respited: and now he pleaded his Pardon, whereby the burning in the hand, and all other Felonies committed by him, *& alia malefacta*, before 8*th* of *July* last were pardoned: and there was an especial Clause, that he should not find Suretys for his behaviour, and the Pardon bore date 31 of *Octob.* last. And although there were many misdemeanors by him after the said 8*th* of *July*, for which he deserved to be bound to the good behaviour, yet he had his Pardon allow'd, and was discharged from finding Suretys, *&c.*

Cro. 1. part. Linley's Case. Secondly, Sir *Henry Linley*, who was indicted of Treason, being brought to the Bar, and demanded, whether he could say any thing why the Court should not proceed upon the Indictment, which was before Commissioners of *Oyer & Terminer*, he produced the Queens Pardon, without any Writ of Allowance thereof. And *Pope Second* Clerk of the Crown, inform'd the Court, that the Presidents were, that in case of Treason, it was used to allow of the Pardon; but

but not in Felony, whereupon the Pardon was allowed.

Thus much of Pardons.

4. Of Restitutions.

All that is forfeited to the King by any Attainder, &c. he may restore by his Charter, But if by the Attainder the Blood be corrupted, that must be restor'd by Authority of *Parliament*: and the reason wherefore the King may by his Charters pardon the Execution, and restore the Party or his Heirs to the Lands forfeited by the Attainder, and remaining in the Crown, is for that no Person hath thereby any prejudice, but to make restitution of his Blood, the King cannot do it, but by Act of *Parliament*, because it should be to the prejudice of others.

And the Rules are,

Non poterit Rex gratiam facere cum injuria, & damno aliorum.

Quod alienum est, dare non potest Rex per suam gratiam.

Quacunque forma Princeps alienat, salvum manet Jus tertii.

Aliorum honores, aliis damnorum occasionem fierinon oportet.

Note; Of Restitutions by *Parliament*, some be in Blood only, (that is to make his Resort as heir in Blood to the Party attainted, and other his Ancestors, and not to any Dignity, Inheritance of Lands, &c.) and this is *Restitutio ad tempus, secundum quid, seu in partem.* And

some be general Restitutions, to Blood, Honours, Dignities, Inheritance, and all that was lost by the Attainder; and this is *Restitutio in integrum*; and *Restituere* (generally) *nihil aliud est, quam in pristinum statum reducere.*

Co. 3. Inst. 240.

Thus now, concluding this slender Treatise with the Kings Mercy, that is convey'd to his Subjects by Pardons and Restitutions, I humbly apply to our most Gracious Soveraign the words, which *Seneca* did once intimate to the *Roman* Emperor §.

Occidere contra Legem nemo potest: servare nemo præter te.

The

The Author hath written ſomewhat (touching the Statutes of Hue and Cry, *for the better and more ſpeedy apprehenſion of ſuch as are guilty of Robberies) which ſhould have been placed before under the Title of Robbery; but it being by ſome inadvertence there omitted, the Printer has thought it not much amiſs to put it at the end of this Diſcourſe, by way of Appendix. And thus the Author treats concerning the Statutes of* Hue and Cry.

BY the Statutes of 13. *E.* 1. of *Winton*, *c.* 1. 28. *E.* 3. *c.* 11; and 28. 1. *c.* 17. the Country ſhall anſwer, if the Robbers be not taken. 13. *E.* 1. *c.* 1.

By the Statute of 27. *Eliz. c.* 13. are enacted theſe particularities §. 27. *Eliz. c.* 13.

1. That the Inhabitants of a hundred ſhall be chargeable with the moyety, where a freſh Suit ſhall ceaſe.

2. That the Clerk of the Peace ſhall proſecute the Suit: which Suit commenced, ſhall not ceaſe upon the death, or remotion of the ſaid Clerk of the Peace.

3. A Remedy for thoſe, againſt whom the Recovery and Execution is had, to have Contribution.

4. That there ſhall be no penalty, where any of the offenders be apprehended.

5. The Suit ſhall be commenced within one year next, after ſuch perpetration, or Robbery, or elſe the Perſon, or Perſons robbed, ſhall not take any benefit by vertue of any of the ſaid former Laws or Statutes.

6. That the Party robbed muſt give notice and intelligence of the Robbery committed unto ſome of the Inhabitants of ſome Town, Village, or Hamlet near unto the place, where any ſuch Robbery ſhall be committed.

7. That the Party robbed ſhall not have any Action, upon any of the Statutes aforeſaid, except he ſhall firſt within twenty days next after ſuch Action to be brought, be examined upon his Corporal Oath before ſome Juſtice of Peace of the County where the robbery was committed, whether he doth know the Parties that committed the Robbery, or any of them; and then ſhall become bound to proſecute the offenders.

Having given a ſummary of theſe Statutes upon Hue and Cry, I ſhall preſent to the Reader ſeveral Reſolutions given at the Courts of *Weſtminſter*, upon the Statute of *Wincheſter*, and the Stat. of 27. *Eliz.* The former, you muſt kow, gives penalty and Remedy, the latter ſhews how the Examination ſhall be, and in what time before the Action brought.

1. *Re*

1. *Resolves on the Stat. of* Winton.

A Robbery for which the hundred must answer by force of the Statute of *Winton*, is to be done openly; so as the Country may take notice thereof themselves: but a robbery done secretly in the House, the Country cannot take notice thereof, for every one may keep his house as strong as he will at his peril; for it was adjudged in *Ashpoles* Case, that the Party robbed needed not to give notice thereof to the Country; for it may be the Party robbed was bound, or Maimed, *&c.* so as he could not make Hue and Cry to give notice. Co. Lib. 7. *Sendik's* Case *f.* 6.

A Robbery was done in *January* presently after the Sun-setting, during day light; and it was adjudged, that the hundred shall answer for the same, for it was convenient time for Men to travel, or to be about their Business. Ibidem.

A Robbery was done in the Morning, *ante lucem*, the hundred shall not be charged. Co. Lib. 7. *Milbornes* Case.

It was held by *Anderson*, and all the Justices that whereas the Stat. of *Winchester* speakes of Robberies done in the day, before night; yet if a Robbery be committed in the Morning before day, or in the Evening after the day, in any time of the night, in which Men use commonly to travel, that the hundred is answerable for it; but if it be at twelve or one of the Clock in the night, at which time every one is intended to be in bed, the hundred is not answerable for the Robbery. Cro. 1. part. *Ridgeley*, 2. Hundred of *Warrington* 70.

Cro. 2. part. *May*, *v.* Inhabitants of Hundred *de Marley* 106.

The Jury found, that the Robbery was done *post lucem ejusdem diei, & ante Solis ortum, Anglice*, After day-break, and before Sun-rising; and upon this the Court advised, and Judgement was given for the Plaintiff, and a President shewn *Pasch.* 28. of *Eliz. Rot.* 130. where the Robbery was done *post occasum Solis, & per diurnum lumen*; *Anglice*, day light, and there adjudged for the Plaintiff.

Cro. 1. part. *Anonymus* 753.

If an house be robbed in the day; and the Felons escape, Hue and Cry being made; whether the hundred shall answer for that Robbery, by the Stat. of *Winton*? *Gawdy* and *Popham* conceived, that the hundred shall not be charged: For the Stat. of *Winton* extends only to Robberies done to the Person: And was principally made for safeguard of travellers. But every one ought to keep his own house at his peril; for it is his Castle, and no other ought to meddle there: & therefore it is not reason, that any should be charged, if he be robbed there.

Cro. 2. part. *Wait*, *v.* Hundred of *Stoke* f. 496.

Robbery done on a Sunday shall be chargeable to the Country.

2. *Re-*

2. *Resolves on the Stat. of* 27. Eliz.

By the Stat. of 27. *Eliz. c.* 13. none shall have Action upon the said Statute, except the Parties robbed, so soon as he may give notice of the same to any of the Inhabitants of any Village, Town, or Hamlet, next to the place where the Robbery was done, and if they in pursuit apprehend any of the offenders, that will excuse the Town. Co. Lit. 7. *f.* 6. *Sendals* Case.

Action upon the Statute of *Winton*, for that one *Brook* his Servant was robbed; and alledges that the Plaintiff himself came before a Justice of Place, and was sworn according to the Stat. of 27. *Eliz.* And after Verdict, it was alledged in Arrest of Judgement, that the Servant was to be sworn, and not the Master; and so was the opinion of the Court: For the Servant might know the Persons, when the Servant was robbed, and the Master was not in company; and the Intent of the Stat. is, that he that had notice, shall be sworn, and thereupon Judgment was staid. Cro. 1. part. *Greenscise f.* 142.

Action upon the Stat. of *Winton*, whereas one *Palmer*, the Plaintiffs Servant was robbed within the hundred of 68 pounds, by Persons unknown, and had made Hue and Cry, according to the Stat. and one of the Thieves were taken, and the said *Palmer* had made oath before such a Justice of Peace, of the said County next adjoyning to the said hundred within 20 daies, before this Action brought, that Cro. 3. part. *Raymond*, v. Hundred *de Oking* 37, & 38.

he did not know any of the Parties, who robbed him, that the said Hundred had not made him any recompense. And upon Not-guilty pleaded, and tryed at the Bar this Terme, and found for the Plaintiff, it was moved in Arrest of Judgment, that this Action lyes not, because the Plaintiff himself was not sworn, that he knew not any of the Parties, who did the Robbery; for it is not sufficient, that the Servant who was robbed was sworn, for by the Statute of 27. *Eliz.* the Party who brings the Action ought to make that Oath, and it was argued, that the Servant who was robbed ought to have brought the Action, and then his Oath would have been sufficient: But when the Master brings the Action, he himself ought to be sworn, that he knew not any of the Robbers, otherwise he might not bring it, and therefore the Action lyes not. But it was resolved by the Court, that the Action well lyes for the Master, and that the Servants Oath was sufficient, for it is properly in his notice, that he was robbed, and did not know any of the Robbers, and the Master knows it not that he was robbed, or who were the Persons, but by the report of his Servant; and it would be inconvenient, if the Master should not bring the Action, but the Servant might release, or compound or discontinue the Suit, and so the Master should have the loss by his falshood; therefore the Master shall bring the Action, and have his Servant, who was robbed, be his witness: whereupon it was adjudged for the Plaintiff.

Action

Action upon the Stat. of Hue and Cry, supposing that he was robbed in such a Highway, *in diversis Hundredorum*, and that he gave notice thereof to the Inhabitants of the Hundred near to the Place where he was robbed. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this declaration is not good, because he doth not shew that the High way is within any Hundred. And in truth, it out to be given to the Inhabitants of both Hundreds, and so be divers Presidents that notice was given in the other Hundred, to the Inhabitants of that hundred: *Sed non allocatur*; wherefore it was adjudged for the Plaintiff.

Cro. 2. part. *Foster, v. Inhabitantes Hundredorum de Spehar f.* 675.

Hue and Cry made in the next Vill adjoyning, though it were in another County, is good enough: for a Stranger cannot know the division of Countys.

Cro. 3. part. *Tutter, v.* Inhabitants of *Daccorar.*

Vide Cro. 3. part. Merrik. v. Hundred. de Rapesgate 279.

Action upon the Stat. of *Winton* of Hue and Cry, and shews in his Count the said Statute, and that such a day he was robbed of so much within that Hundred; and that he made Hue and Cry: and shews according to the Statute of 27. *Eliz.* And that within 40 days before the Action brought, he was sworn before such a Justice of Peace, that he was robbed of so much, and did not know any of the Felons; & that as yet the Defendants had not taken any of the Felons, nor satisfy'd him *contra formam Stat. prædict. unde Actio accrevit.* After Verdict for the Plaintiff, it was moved that

Co. 2. part. *Andrews, v.* Hundred of *Lewknour* 187.

that this Declaration was not good, becauſe the Action is founded upon two Statutes, and both mentioned in the Declaration; yet he concludes, *contra formam Statuti prædicti*, which is not good; and the Court thereupon doubted, and appointed Preſidents to be ſearched; and after divers Preſidents of this Court, and the *Common Bench* ſhewn unto them, wherein ſome were *Contra formam Stat. prædict.*, and ſome *Statutorum prædictorum*: And the Court held that the beſt forme was *Statuti prædicti*. For the Action was grounded only upon the Statute of *Winton*, which gives penalty, and remedy (the other ſhews only how the Examination ſhall be, and in what time before the Action brought, otherwiſe he ſhall not have the Action) and *Statuti prædicti* refers only to the Stat. of *Winton*, which gives the Action therefore the beſt form to declare is *Contra formam Statuti prædicti*.

Thus much of the Statutes touching Hue and Cry.

FINIS.

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